No. 92-1662-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Ralph Stuart Granderson, Jr.

Docketed:
April 15, 1993

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Solicitor General, Solicitor General

Counsel for respondent: Smith,Gregory

2-19-93 ext til 4-15-93, J. Kennedy, CITED.

Entry	Date	Note	Proceedings and Orders
1	Feb 19 1993	G	Application (A92-626) to extend the time to file a petition for a writ of certiorari from February 28, 1993 to April 29, 1993, submitted to Justice Kennedy.
2	Feb 19 1993		Application (A92-626) granted by Justice Kennedy extending the time to file until April 15, 1993.
3	Apr 15 1993	G	Petition for writ of certiorari filed.
4	May 19 1993		DISTRIBUTED. June 4, 1993
6	May 19 1993		Brief of respondent Ralph Stuart Granderson in opposition filed.
7	May 19 1993	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	May 24 1993	P	Response requested -- JPS. (Due June 24, 1993)
8	Jun 2 1993		REDISTRIBUTED. June 18, 1993
11	Jun 9 1993		REDISTRIBUTED. June 25, 1993
12	Jun 28 1993		Motion of respondent for leave to proceed in forma pauperis GRANTED.
13	Jun 28 1993		Petition GRANTED.
			**********
14	Jul 6 1993	G	Motion of respondent for appointment of counsel filed.
15	Aug 12 1993		Joint appendix filed.
16	Aug 12 1993		Brief of petitioner United States filed.
18	Aug 23 1993		Order extending time to file brief of respondent on the merits until October 8, 1993.
19	Sep 24 1993		Record filed.
		*	Certified record proceedings U.S.C.A. Eleventh Circuit and U.S.D.C.,Northern Dist. Georgia(Also,SEALED ENVELOPE)
20	Oct 4 1993		Motion for appointment of counsel GRANTED and it is ordered that Gregory S. Smith, Esquire, of Atlanta, Georgia, is appointed to serve as counsel for the respondent in this case.
21	Oct 8 1993		Brief amicus curiae of American Bar Association filed.
22	Oct 8 1993		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
24	Oct 8 1993		Brief of respondent Ralph Stuart Granderson filed.
23	Oct 13 1993	D	Motion of respondent to dismiss the writ as improvidently granted filed.
25	Nov 1 1993		DISTRIBUTED. November 5, 1993 (above motion)
26	Nov 1 1993		Opposition of United States to motion of respondent to dismiss the writ as improvidently filed.

No. 92-1662-CFY

Entry	Date	Note	Proceedings and Orders
27	Nov 8 1993		Motion of respondent to dismiss the writ as improvidently granted DENIED.
28	Nov 16 1993		CIRCULATED.
29	Nov 22 1993		SET FOR ARGUMENT MONDAY, JANUARY 10, 1994. (1ST CASE).
30	Nov 29 1993	X	Reply brief of petitioner United States filed.
31	Jan 10 1994		ARGUED.

92-1662

No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH STUART GRANDERSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS G. HUNGAR
Assistant to the Solicitor General

THOMAS M. GANNON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Under 18 U.S.C. 3565(a), a defendant who was originally sentenced to a term of probation and who is found to have violated a condition of his probation ordinarily may be continued on probation or may have his sentence of probation revoked, in which case the court may impose any other sentence "that was available" at the time of the defendant's original sentence. If the defendant is found to be in possession of a controlled substance, however, the court must revoke the sentence of probation and must sentence the defendant to "not less than one-third of the original sentence." The question presented is whether the court of appeals erred in concluding that the term "original sentence" as used in Section 3565(a) refers to the sentence of imprisonment available under the Guidelines sentencing range applicable to the defendant at the time of his original sentencing hearing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1992

No.

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH STUART GRANDERSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 969 F.2d 980. The order of the district court (App., *infra*, 12a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1992. A petition for rehearing was denied on November 30, 1992. App., *infra*, 16a. On February 19, 1993, Justice Kennedy extended the time for filing a petition for a writ of certiorari to

and including April 15, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

In pertinent part, 18 U.S.C. 3565(a) provides:

> If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may * * *
>
> (1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or
>
> (2) revoke the sentence of probation and impose any other sentence that was available under subchapter A [*i.e.*, 18 U.S.C. 3551-3559, the general sentencing provisions] at the time of the initial sentencing.
>
> Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance * * * the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.

STATEMENT

1. Pursuant to a guilty plea entered in the United States District Court for the Northern District of Georgia, respondent was convicted on one count of delay or destruction of mail, in violation of 18 U.S.C. 1703(a). App., *infra*, 2a. The statutory maximum for respondent's offense was five years' imprisonment and a $250,000 fine. See 18 U.S.C. 1703(a), 3571. Under the Sentencing Guidelines, the potential imprisonment range, in light of respondent's adjusted

offense level and criminal history category, was zero to six months. App., *infra*, 2a. The district court imposed a sentence of five years' probation and a $2,000 fine. Rec. Exc. R1-7, at 2, 4. The conditions of probation included the requirement that respondent undergo periodic testing for illegal drug use. App., *infra*, 2a.

On June 28, 1991, respondent's probation officer filed a petition for revocation of respondent's probation, alleging that "[respondent] has possessed/used drugs in that on 5-10-91 and 6-7-91, [respondent] rendered urine samples which tested positive for cocaine metabolite." Rec. Exc. R1-10, at 1. Thereafter, the district court held a hearing on the petition to revoke the sentence of probation. The court found that respondent had possessed controlled substances within the meaning of 18 U.S.C. 3565(a), which provides that when "a defendant is found by the court to be in possession of a controlled substance * * * the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." Accordingly, the court revoked respondent's probation. See Transcript of Revocation of Probation Hearing (Tr.) 12-14, 18; App., *infra*, 12a-13a.[1]

---

[1] Respondent admitted that he had used drugs, but he argued that mere use did not qualify as possession so as to require revocation of probation under Section 3565(a). Tr. 3. The government contended that drug use was inevitably accompanied by possession. Tr. 5. The court found in favor of the government on that issue. See Tr. 12 ("[T]here's no way that you can ingest it without possessing it"); App., *infra*, 13a ("A reasonable mind cannot conceive of a person using and ingesting of [*sic*] a controlled substance into the human

Applying 18 U.S.C. 3565(a), the district court then concluded that it was required to sentence respondent to a term of imprisonment that was at least one-third of the length of respondent's original sentence of probation. The court reasoned that the phrase "original sentence" as used in Section 3565(a) referred to the original sentence of probation that was actually imposed on respondent, not the potential sentence of imprisonment that was available under the applicable Guidelines sentencing range at the time of respondent's initial sentencing. App., *infra*, 12a-14a. Accordingly, the court sentenced respondent to a term of 20 months' imprisonment—one-third of the original five-year sentence of probation—to be followed by a three-year period of supervised release. App., *infra*, 14a; Tr. 18-19.

2. The court of appeals upheld the order revoking respondent's probation,[2] but it vacated his sentence. App., *infra*, 1a-11a. The court began its analysis by noting the existence of a circuit conflict on the meaning of the phrase "original sentence" as used in 18 U.S.C. 3565(a). App., *infra*, 5a-6a, citing *United States* v. *Corpuz*, 953 F.2d 526 (9th Cir. 1992) (holding that "original sentence" refers to the original sentence of probation); and *United States* v. *Gordon*, 961 F.2d 426 (3d Cir. 1992) (holding that "original sentence" refers to the sentencing range that was available under the Guidelines at the initial sentencing hearing). Aligning itself with the Third

body without having possession of that controlled substance.").

[2] The court of appeals rejected respondent's argument that he had not possessed drugs within the meaning of Section 3565(a). App., *infra*, 3a-4a.

Circuit's decision in *Gordon*, the court of appeals rejected the government's contention that the phrase "original sentence" in Section 3565(a) refers to the original sentence of probation that was actually imposed on the defendant.

Noting that respondent's original Guidelines sentencing range was zero to six months' imprisonment, the court of appeals declined to construe Section 3565(a) to permit imposition of a longer sentence on revocation of probation. Instead, the court reasoned that "[t]he length of [respondent's] original sentence is limited by the Guideline range available at the time that he was sentenced to probation. If [respondent] could not be subjected to [20] months incarceration for the crime of which he was convicted, he cannot now be sentenced to that term for violation of his probation." App., *infra*, 8a.

The court declined to follow the contrary reasoning of the Ninth Circuit in *Corpuz* and the Eighth Circuit in *United States* v. *Byrkett*, 961 F.2d 1399 (1992). See App., *infra*, 8a-9a & n.3. In concluding that the phrase "original sentence" referred to the defendant's original sentence of probation, those courts relied on the fact that probation, like incarceration, is a type of sentence under current federal sentencing law. The court of appeals found that reasoning to be flawed because "[p]robation and imprisonment are not fungible." *Id.* at 9a.

The court of appeals also rejected the Ninth Circuit's reliance on analogous language in 18 U.S.C. 3583(g). Under that provision, a defendant who possesses controlled substances while on supervised release will have his supervised release terminated and will be sentenced to "not less than one-third of the

term of supervised release." Reasoning that supervised release is "different from probation," the court of appeals rejected the contention that Section 3565(a) and Section 3583(g) should be construed in a similar fashion to achieve similar sentencing results. App., *infra*, 9a-10a.

Instead, the court of appeals pointed to 18 U.S.C. 3565(b), which provides that when a defendant possesses a firearm while on probation the court shall revoke the defendant's probation and sentence the defendant to "any other sentence that was available" at the time of the original sentencing. Conceding that the language of Section 3565(b) differs from the relevant language of Section 3565(a), the court nonetheless found it "unlikely" that Congress "intended that the use of two slightly different phrases in two otherwise similar provisions would lead to such dramatically different results." App., *infra*, 10a. Accordingly, the court vacated respondent's sentence of imprisonment. Because respondent had already served more than the six-month sentence of imprisonment that was the maximum that could have been imposed under the court of appeals' interpretation of Section 3565(a), the court ordered that respondent be released immediately.

REASONS FOR GRANTING THE PETITION

This case presents an important question of federal sentencing law on which the courts of appeals are divided. When a probationer violates his probation by possessing a controlled substance, 18 U.S.C. 3565(a) requires that his probation be revoked and that he be sentenced to a term of imprisonment that is "not less than one-third of the original sentence."

The differing interpretations of that statutory phrase that have been adopted by the courts of appeals lead to dramatically different results in otherwise identical cases. Moreover, the question of the proper sentencing range applicable in cases of this kind is one that arises with great frequency. This Court's review is necessary in order to ensure the uniformity of federal sentencing decisions and to resolve the conflict among the circuits.

1. The circuits are sharply divided over the question presented in this case. Four courts of appeals—the Eleventh Circuit below, the Tenth Circuit in *United States* v. *Diaz*, No. 92-2158 (Mar. 22, 1993), slip op. 4-7, the Sixth Circuit in *United States* v. *Clay*, 982 F.2d 959, 963-964 (1993), and the Third Circuit in *United States* v. *Gordon*, 961 F.2d 426, 430-433 (1992)—have held that the phrase "original sentence" as used in 18 U.S.C. 3565(a) refers to the sentencing range applicable to the defendant under the Sentencing Guidelines when the defendant was originally sentenced. Under that approach, the sentence imposed upon revocation of probation for possession of a controlled substance must be at least one-third of the sentence at the top of the applicable Guidelines sentencing range. See *United States* v. *Clay*, 982 F.2d at 964; *United States* v. *Gordon*, 961 F.2d at 433; App., *infra*, 10a.

Two other courts of appeals—the Eighth Circuit in *United States* v. *Byrkett*, 961 F.2d 1399, 1400-1401 (1992), and the Ninth Circuit in *United States* v. *Corpuz*, 953 F.2d 526, 528-530 (1992)—have held that the phrase "original sentence" as used in Section 3565(a) refers instead to the sentence of probation that was originally imposed on the defendant. Un-

der that interpretation, district courts must sentence a defendant who possesses drugs while on probation to a term of imprisonment that is at least one-third as long as the defendant's original term of probation. *United States* v. *Byrkett*, 961 F.2d at 1400-1401; *United States* v. *Corpuz*, 953 F.2d at 528-529.

These conflicting interpretations of Section 3565(a) lead to very different sentences in similar cases. Because probation is ordinarily available only for defendants whose Guidelines sentencing range does not exceed 6 to 12 months, the approach followed by the Third, Sixth, and Tenth Circuits and by the court of appeals in this case will ordinarily yield a minimum mandatory term of 2 to 4 months' imprisonment on revocation of probation. Under the approach followed by the Eighth and Ninth Circuits, on the other hand, the possible range of sentences available on revocation of probation varies according to the length of the sentence of probation originally imposed on the defendant. In felony cases, the minimum sentence required by Section 3565(a) will range from 4 to 20 months' imprisonment, because the authorized sentences of probation range from 12 to 60 months. 18 U.S.C. 3561(b)(1); Sentencing Guidelines § 5B1.2.[3]

In this case, the court of appeals' approach mandated a minimum sentence of only two months' imprisonment. If the case had arisen in the Eighth or

[3] In some cases—frequently cases involving misdemeanors—in which a sentence of probation is authorized, the maximum term of probation is limited to 36 months. See Sentencing Guidelines § 5B1.2(a)(2). In those cases, the minimum sentence required by Section 3565(a) would not exceed 12 months.

Ninth Circuits, a sentence of at least 20 months' imprisonment would have been required. Similar disparities will be created in most other cases in which revocation of probation results from or is accompanied by a finding of drug possession. As a result, the term of incarceration served by defendants after revocation of probation will vary widely depending on the circuit in which the defendant was originally convicted.

Unlike many other issues of federal sentencing law, this case involves the interpretation of a statute rather than the Guidelines, and the question it raises therefore cannot be resolved by the Sentencing Commission. See *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991). Moreover, the question is one that arises with considerable frequency, as is demonstrated by the fact that it has generated six published decisions of the courts of appeals in less than two years.[4] The circuit conflict on the issue shows no sign of narrowing.[5] Accordingly, review by this Court is warranted.

2. The court of appeals erred in its construction of the phrase "original sentence" as used in Section 3565(a).

When a defendant possesses controlled substances while on probation, Section 3565(a) requires the dis-

[4] Those decisions have, moreover, exhaustively canvassed the relevant arguments in favor of and against the various interpretations of the statute, so there is no reason to await further consideration of the issue in the lower courts.

[5] The Ninth Circuit recently declined to depart from its holding in *Corpuz* despite the existence of the circuit conflict. See *United States* v. *Avakian*, No. 92-10269, 1992 U.S. App. LEXIS 32326 (9th Cir. Dec. 2, 1992).

trict court to "revoke the sentence of probation" and sentence the defendant to "not less than one-third of the original sentence." The statute contains no definition of the phrase "original sentence." It is clear, however, that probation is a "sentence" within the meaning of federal sentencing law in general and Section 3565 in particular. See 18 U.S.C. 3565(a), (a)(2), and (b) (referring to "the sentence of probation"); see also 18 U.S.C. 3561(a) ("A defendant * * * may be sentenced to a term of probation"); 18 U.S.C. 3563(a) ("a sentence of probation"); 18 U.S.C. 3564(a) ("A term of probation commences on the day that the sentence of probation is imposed").[6] Thus, in the context of probation revoca-

[6] Prior to 1984, the federal sentencing scheme treated probation as an alternative to a sentence, rather than as a sentence in its own right. See *United States* v. *Corpuz*, 953 F.2d at 528. The Sentencing Reform Act of 1984 worked substantial changes in the system of federal sentencing, however, including a marked shift from the traditional view of probation as merely a reprieve from a sentence of imprisonment. As the Committee Report accompanying the 1984 Act declared, "[p]roposed 18 U.S.C. 3561, unlike current law, states that probation is a type of sentence rather than a suspension of the imposition or execution of a sentence." S. Rep. No. 225, 98th Cong., 1st Sess. 88 (1983). The Sentencing Guidelines confirm that understanding of the statute. See Guidelines § 7A2(a) ("the Sentencing Reform Act recognized probation as a sentence in itself"). Accordingly, the Third and Sixth Circuits clearly erred in rejecting the government's interpretation of Section 3565(a) on the ground that probation is not a sentence within the meaning of the phrase "original sentence." See *United States* v. *Clay*, 982 F.2d at 962 (declining to treat probation as a "sentence" for purposes of Section 3565(a) because "the term 'original sentence' should mean what it has always meant—a sentence of imprisonment"); *United States* v. *Gordon*, 961 F.2d at 432 (holding

tion, the term "original sentence" refers to the original sentence of probation that was imposed on the defendant at the initial sentencing hearing, and a mandatory sentence of imprisonment of "not less than one-third of the original sentence" means a term of imprisonment at least one-third as long as the original sentence of probation.

The court of appeals held that the phrase "original sentence" refers to the top of the Sentencing Guidelines sentencing range applicable to the defendant at the time of his initial sentencing hearing. That interpretation of Section 3565(a) cannot be squared with the plain language of the statute, because a potential sentence of imprisonment that could have been imposed on a defendant is simply not the "original sentence" that the defendant actually received. As Judge Greenberg cogently observed in *Gordon*, "as a simple matter of plain meaning, I do not understand how the term 'original sentence' * * * can be equated to the maximum available sentence under the guideline range in cases such as this where the maximum available sentence has not been imposed. To me the term 'original sentence' means an actual as contrasted to an 'available' sentence." 961 F.2d at 434 (Greenberg, J., concurring in judgment).

The conclusion that the phrase "original sentence" refers to the original sentence of probation actually imposed on the defendant receives further support from Congress's resolution of the same issue in the context of supervised release. Under 18 U.S.C.

that statutory references to probation as a "sentence" worked "merely a change in form, rather than substance," and thus that Congress could not have intended the phrase "original sentence" to refer to the original sentence of probation).

3583(g), a defendant who is found in possession of a controlled substance during a term of supervised release must be sentenced to a term of imprisonment that is "not less than one-third of the term of supervised release." Congress obviously viewed that provision and Section 3565(a) as parallel and closely related because it included both of them in the same section of the Anti-Drug Abuse Act of 1988. See Pub. L. No. 100-690, Tit. VII, § 7303(a)(2) ("one-third of the original sentence"), (b)(2) ("one-third of the term of supervised release"), 102 Stat. 4464. These two provisions were directed at precisely the same problem, and it is therefore reasonable to construe them *in pari materia* to call for parallel treatment of drug offenders who are under non-custodial supervision.

To be sure, Congress did not make its meaning as clear in Section 3565(a) as it did in Section 3583(g); Section 3565(a) would have been clearer if Congress had not simply referred to "one-third of the original sentence," but had referred instead to "one-third of the original sentence of probation." But because, in the context of probation revocation, the "original sentence" is always a sentence of probation, it should not have been necessary for Congress to add the specific reference to probation in order for the meaning of Section 3565(a) to be clear.

The term "original sentence" cannot plausibly be read to mean "the top sentence of imprisonment that would have been available under the defendant's Guidelines sentencing range if the district court had chosen to impose a sentence of imprisonment at the original sentencing hearing." Nonetheless, four circuits have now adopted that unlikely construction of the statute. Because the circuits are badly divided on

a significant question of federal sentencing law, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS G. HUNGAR
Assistant to the Solicitor General

THOMAS M. GANNON
Attorney

APRIL 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-8728

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

RALPH STUART GRANDERSON, JR.,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Georgia

Aug. 4, 1992

Before KRAVITCH, Circuit Judge, CLARK*, Senior Circuit Judge, and PITTMAN**, Senior District Judge.

KRAVITCH, Circuit Judge:

Defendant-Appellant Ralph Granderson appeals a district court order revoking his probation due to pos-

---

* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

session of a controlled substance and sentencing him to twenty months incarceration. For the reasons discussed below, we vacate the sentence and order the appellant released from custody.

I. FACTS

Ralph Granderson was charged by information in federal district court with one count of delay or destruction of mail under 18 U.S.C. § 1703(a), which carries a possible term of zero to six months incarceration under the Sentencing Guidelines. *See* U.S.S.G. § 2B1.3. He pled guilty on March 18, 1991, and received a term of five years probation, which included a standard provision for urinary testing for use of alcohol and drugs.

Granderson's probation officer filed an application for revocation of probation on June 28, 1991, informing the court that the appellant's urine sample had tested positive for cocaine. The district court held a hearing on the application and determined that there was a violation of the conditions of probation.

Under the Anti-Drug Abuse Act of 1988, if a probationer is found to be in possession of a controlled substance, "[n]otwithstanding any other provision of this section, . . . the court *shall* revoke the sentence of probation and sentence the defendant to *not less than one-third of the original sentence*." 18 U.S.C. § 3565(a)(1988) (emphasis added). The district court determined that Granderson's original sentence was a term of five years (sixty months) probation. The court calculated that one-third of that term was twenty months incarceration, which defendant was directed to serve, followed by a period of three years supervised release. Granderson has been incarcerated since August 26, 1991.

Defendant appealed, contending (1) that he did not "possess" drugs within the meaning of section 3565; and (2) that the district court erred in concluding that the "original sentence" to which section 3565 referred was five years, rather than zero to six months, the term of incarceration to which he could have been sentenced.[1]

II. ANALYSIS

A. *"Possession" of Drugs*

The defendant contends that his positive urinalysis demonstrates that he merely "used" drugs and was not in "possession" of cocaine within the meaning of section 3565. Granderson correctly notes that the Sentencing Guidelines leaves [*sic*] to the district court the determination of whether evidence of drug usage established solely by laboratory analysis constitutes "possession of a controlled substance" as set forth in the statutes. U.S.S.G. § 7B1.4, application note 5. The district court, however, reviewed the evidence, exercised its factfinding power and determined that the defendant had possessed cocaine and thereby violated probation. A district court's findings of fact are binding on this court unless clearly erroneous. *United States v. Forbes*, 888 F.2d 752, 754 (11th Cir. 1989). Appellant has given us no reason to question the validity of the court's finding; accordingly,

---

[1] At oral argument, appellant also contended that the district court erred in not considering alternatives to incarceration, noting that section 3565 does not specify what form of punishment should replace the revoked probation. Granderson did not raise this issue to the district court, nor did he brief the question on appeal; therefore, it is not properly before this court.

we affirm the district court's revocation of probation for possession of a controlled substance.

B. *The "Original Sentence"*

Section 3565 sets out the standards for revocation of probation. Prior to the 1988 amendments, if the district court determined that a defendant had violated the terms of his probation, the court had the discretion to:

> (1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or
>
> (2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

18 U.S.C. § 3565(a) (1984). As noted above, the 1988 amendments to section 3565 make revocation of probation mandatory if a probationer possesses a controlled substance; the district court shall then impose a sentence of incarceration of not less than one-third of the original sentence.

The question presented is whether the term "one-third of the original sentence" in section 3565 refers to the term of probation or the term of incarceration to which the defendant could have been sentenced. The government contends that the district court correctly determined that the act refers to the term of probation, which is sixty months, and that the court was required to impose at least a twenty-month prison sentence. The defendant, on the other hand, points out that the crime for which he actually was sentenced carries a possible term of incarceration of

only zero to six months and, therefore, he is subject to only a mandatory sentence of two to six months incarceration.

We review legal interpretations of sentencing provisions and the legality of a sentence *de novo*. *U.S. v. Scroggins*, 880 F.2d 1204, 1206 n. 5 (11th Cir. 1989), *cert. denied*, 494 U.S. 1083, 110 S.Ct. 1816, 108 L.Ed.2d 946 (1990).

We must first look to the meaning of the term "sentence" as used by Congress in section 3565. Prior to the Sentencing Reform Act of 1984, probation was not considered a sentence. A court could either (1) suspend the imposition of sentence and place the defendant on probation, or (2) impose a prison sentence, suspend its execution and put the defendant on probation. *See* 18 U.S.C. § 3651 (1982) (repealed 1986). Under the Comprehensive Crime Control Act of 1984, however, probation is a type of sentence in and of itself. *See* 18 U.S.C. § 3561 (1985); *United States v. Smith*, 907 F.2d 133, 134 n. 1 (11th Cir. 1990).

The meaning of the term "original sentence" as used in section 3565 is a question of first impression in this circuit. The circuits that have considered the issue have reached opposite conclusions. In *United States v. Corpuz*, 953 F.2d 526 (9th Cir. 1992), the appellant pled guilty to a charge of counterfeiting; under the Sentencing Guidelines, he faced incarceration for one to seven months, but the district court sentenced him to three years probation. One year later, Corpuz was found to have possessed methamphetamine and his probation was revoked. He was sentenced to one year incarceration. The Ninth Circuit upheld the sentence.

The Third Circuit reached the opposite conclusion in *United States v. Gordon*, 961 F.2d 426 (3rd Cir. 1992), a case almost identical to the one before us. In *Gordon*, the defendant pled guilty to one count of interfering with the mails under 18 U.S.C. § 1703. She could have received a sentence of zero to four months imprisonment, but was sentenced to three years probation. Gordon tested positive for cocaine, had her probation revoked, and was sentenced to one year incarceration. The Third Circuit overturned the sentence, taking issue both with the Ninth Circuit's statutory interpretation and its attempts at "legal alchemy to transform three years probation into one year imprisonment under the 1988 drug amendment." *Gordon*, 961 F.2d at 432. The *Gordon* court also disagreed with the concept of probation as a sentence unto itself. Although we agree with the general approach of the Third Circuit in *Gordon*, we also take the opportunity to relate where our analyses diverge.

The statute does not specify whether the term "original sentence" refers to the term of probation or to the range of incarceration established by the Guidelines. When interpreting ambiguous criminal statutes, the rule of lenity comes into play: We "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Bifulco v. United States*, 447 U.S. 381, 387, 100 S.Ct. 2247, 2252, 65 L.Ed.2d 205 (1980). As we stated in *United States v. Winchester*, 916 F.2d 601, 607 (11th Cir. 1990), the rule "rests on the fear that expansive judicial interpretations will create penalties not originally intended by the legislature" and is "an outgrowth of our reluctance to increase or multiply punishments absent a clear and definitive legislative directive" (citations omitted).

Granderson pled guilty to and was convicted of tampering with the mails, a crime that carries a maximum sentence of six months incarceration. He was never convicted of or even charged with possession of cocaine. The Government was free to indict him on drug charges but chose not to do so. Instead, it proceeded with a probation revocation hearing, at which a court can order imprisonment when it is reasonably satisfied that the probation conditions have been violated; the Government does not have the burden of proving beyond a reasonable doubt that the defendant committed the acts alleged. *United States v. Taylor*, 931 F.2d 842, 848 (11th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1191, 117 L.Ed.2d 433 (992). Possession of cocaine provided the reason for revocation of probation, but it is not the crime for which Granderson is incarcerated. In its policy statements concerning revocation of probation, the Sentencing Commission established that resentencing for violations of probation should sanction primarily the "defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator." U.S.S.G. Chapter 7, Pt. A, 3(b), at 336-337. The Guidelines explicitly reject resentencing violators for the particular conduct triggering the revocation "as if that conduct were being sentenced as new federal criminal conduct." *Id.*[2]

---

[2] We note that even if the government had indicted Granderson for possession of cocaine under 21 U.S.C. § 841 (a), he would have faced a statutory maximum of one year imprisonment; instead, he is serving more than one and a half years.

In *United States v. Smith*, 907 F.2d 133 (11th Cir. 1990), we held that when a defendant's probation is revoked, resentencing is limited to the sentence that was available at the time the underlying offense was committed. A court has discretion to impose a new sentence within the applicable range prescribed by law, but "the guidelines control the imposition of a new sentence after probation revocation in the sense that the original determinations of total offense level and criminal history category . . . delimit the sentences that were then available." *Smith*, 907 F.2d at 135. In *Smith*, the defendant was resentenced under the pre-1988 section 3565, for which revocation was discretionary and a defendant was not subject to mandatory incarceration for a minimum of one-third of the original sentence. Its underlying logic, however, still rings true. The length of Granderson's original sentence is limited by the Guideline range available at the time that he was sentenced to probation. If Granderson could not be subjected to eighteen months incarceration for the crime of which he was convicted, he cannot now be sentenced to that term for violation of his probation. Moreover, by the Government's contorted mathematics, Granderson would be considered to have had an "original sentence" of sixty months incarceration, which is not consistent with the Guidelines.

In reaching the opposite conclusion, the Ninth Circuit focused on the fact that Congress used the phrase "original sentence" in the amendment, not "original period of incarceration," or "any other sentence that was available . . . at the time of the initial sentencing," *Corpuz*, 953 F.2d at 528. The court was not troubled by the conversion of time served on probation to time served in prison; the Ninth Circuit

apparently reasoned that because incarceration and probation are both types of sentences, the two are interchangeable, at least for the purpose of resentencing.[3]

We disagree. Probation and imprisonment are not fungible. As the Third Circuit noted, probation is a form of "conditional liberty" that is likely to be longer than a term of imprisonment. *Gordon*, 961 F.2d at 432 (quoting *Black v. Romano*, 471 U.S. 606, 611, 105 S.Ct. 2254, 2257, 85 L.Ed.2d 636 (1985)). In this case, *instead* of a possible six months incarceration, Granderson received five years probation, a restraint on his liberty that is less severe than imprisonment, but lasts ten times longer. The trade-off was undoubtedly worthwhile to the defendant and illustrates the fallacy of simply converting a term of probation into one of incarceration without taking these differences into account.

The district court and the Ninth Circuit also relied on the fact that the provision relating to violations of supervised release is very similar to the section at issue here:

> If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release.

18 U.S.C. 3583(g) (1988). Supervised release, however, is different from probation. When a defendant receives a sentence of probation, it is an *alternative*

[3] The Eighth Circuit concurred with this approach in *United States v. Byrkett*, 961 F.2d 1399 (8th Cir. 1992).

to imprisonment; a defendant serving time on supervised release has already served his sentence of incarceration and is subject to supervision analogous to what was formerly called "special parole." *See* U.S.S.G. Ch. 7, Pt. A, 2(b).

In another part of the Anti-Drug Abuse Act, section 3565(b), Congress provided for mandatory revocation of probation for possession of a firearm. However, section 3565(b) provides that "the court shall . . . revoke the sentence of probation and impose *any other sentence that was available under subchapter A at the time of the initial sentencing*," 18 U.S.C. § 3565(b) (1988) (emphasis added). Therefore, under section 3565(b), if Granderson had possessed a firearm, he would be subject to only six months incarceration. The government argues that Congress intended to prescribe harsh penalties for possession of drugs. We do not dispute that fact. It is unlikely, however, that Congress intended that the use of two slightly different phrases in two otherwise similar provisions would lead to such dramatically different results. Interpreting the term "original sentence" to mean the sentence of incarceration faced by Granderson under the Guidelines is consistent with the rest of the statute; the mandatory imposition of one-third of that time produces a strict penalty for violation of probation due to possession of a controlled substance.[4] We agree with the Third Circuit that read-

[4] We note that section 3565(a) refers to the imposition of "*at least* one third of the original sentence," which appears to expose Granderson to a possible sentence of sixty months incarceration. At oral argument, the government disputed this interpretation and contended that the minimum term of incarceration was also a maximum sentence. Because Granderson received only a sentence of twenty months, we need not resolve this issue, but merely point out another difficulty with the government's reading of the provision.

ing the provision as the government argues is a form of legal alchemy that would lead to unreasonably harsh results not clearly intended by Congress.

III. CONCLUSION

We are not convinced that Congress intended the term "original sentence" to mean a period of probation imposed in the alternative to incarceration, such that a violation of probation would subject the defendant to more than three times the length of imprisonment he faced when sentenced for his crime. Granderson has already been incarcerated for more than eleven months, although the crime of which he was convicted carries a maximum of six months under the Guidelines. The sentence of twenty months incarceration is VACATED and the appellant is hereby ORDERED released from custody forthwith. The Clerk is directed to issue the mandate upon filing of this opinion.

VACATED and SO ORDERED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Criminal No. 1:91-CR-01

UNITED STATES OF AMERICA

versus

RALPH STUART GRANDERSON, JR.

[Filed Aug. 2, 1991]

ORDER

The captioned matter came before the court for a hearing on July 29, 1991, on the application for revocation of probation. The defendant appeared with his attorney, Greg Smith, Esq., and the government was represented by Assistant United States Attorney Janet King, Esq.

The defendant admitted the allegations of facts concerning revocation of probation, i.e., that he had taken drugs while on probation. The court therefore determined that there was a violation of the conditions of probation.

The defendant contended that the court was limited in sentencing after revocation to the sentence that was available to the court under the guidelines at the time of the original sentence in this case. The guideline range at that time was zero to six months. The

government contended that pursuant to 18 U.S.C. § 3565(a) the court must revoke probation and must impose a sentence of at least one-third of the sentence imposed in the original case. This defendant had originally been sentenced to five years probation. The foregoing code section provides that "notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance thereby violating the condition imposed by § 3563(a)(3), the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence."

The court is of the opinion that Congress used language contemplating a sentence under the previous law which sentence was suspended and probation imposed. Under the sentencing scheme as contemplated by the Sentencing Reform Act of 1984 and the guidelines promulgated pursuant thereto, probation is in fact imposed as a sentence.

While the defendant argued that 18 U.S.C. § 3565 was not applicable because the defendant had merely used drugs and was not in possession of them, the court rejects that argument. A reasonable mind cannot conceive of a person using and ingesting of a controlled substance into the human body without having possession of that controlled substance. The court has therefore found that § 3565(a) is applicable.

We then reach the question as to what Congress meant by one-third of the original sentence. The court finds comfort and guidance in a similar statute relating to possession of a controlled substance in the instance of a defendant on "supervised release." 18 U.S.C. § 3583(g) provides "if the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of super-

vised release and require the defendant to serve in prison not less than one-third of the term of supervised release." The Congress could have used similar language in § 3565 but did not; however, the court is of the opinion that it was the intent of Congress to accomplish the same in both sections.

The court takes note of the case of *U.S. v. Smith*, 907 F.2d 133 (11th Cir. 1990) which states that the court is limited in revocation to the sentence that could have been imposed under the guidelines; however, that case arose under the law prior to the amendment of § 3565 to add the provision now being discussed.

The court therefore believes that it is controlled by 18 U.S.C. § 3565(a) and therefore must impose a sentence of not less than one-third of the sentence of probation. The sentence of probation was five years or sixty months and therefore the court must revoke the probation and impose at least a twenty-month sentence.

The court has ordered that the defendant, Ralph Stuart Granderson, Jr., pursuant to 18 U.S.C. § 3565(a) is hereby committed to the custody of the Bureau of Prisons for a term of twenty months, to be followed by a period of supervised release of three years. Otherwise, the sentence previously imposed by this court by order of March 18, 1991, shall remain unchanged.

The execution of the imprisonment portion of the sentence is hereby deferred until August 26, 1991, at which time the defendant is directed to report to the institution designated for the service of the sentence, or if no designation has been made by the Bureau of Prisons, the defendant shall report to the United States Marshal at the United States Courthouse, Atlanta, Georgia, on or before 12:00 noon on August 26, 1991.

The court recommends that this defendant be incarcerated in an institution that will provide drug treatment to the defendant.

It is further directed that a copy of his order and judgment and commitment be served upon the defendant, defendant's attorney, the Assistant United States Attorney, United States Marshal, United States Probation Office and the Bureau of Prisons.

IT IS SO ORDERED this 2nd day of August, 1991.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8728

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

versus

RALPH STUART GRANDERSON, JR.,
DEFENDANT-APPELLANT

On Appeal from the United States District Court
for the Northern District of Georgia

[Filed Nov. 30, 1992]

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH, Circuit Judge, CLARK*, Senior Circuit Judge, and PITTMAN**, Senior District Judge.

---

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

PER CURIAM:

☒ The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8728

D.C. Docket No. 1:91-CR-01

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

versus

RALPH STUART GRANDERSON, JR.,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Georgia

[Filed Aug. 4, 1992]

Before KRAVITCH, Circuit Judge, CLARK*, Senior Circuit Judge, and PITTMAN**, Senior District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for

---

* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the sentence imposed by the District Court in this cause of twenty months incarceration is hereby VACATED; and the appellant is hereby ORDERED released from custody forthwith, in accordance with the opinion of this Court.

Entered: August 4, 1992

For the Court: MIGUEL J. CORTEZ, Clerk

By: /s/ Karleen McDabe
Deputy Clerk

Issued as Mandate: August 4, 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60298

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO THE UNITED STATES OF AMERICA'S PETITION FOR A WRIT OF CERTIORARI

GREGORY S. SMITH
Georgia State Bar No. 658375
Federal Defender Program, Inc.
Suite 3512, 101 Marietta Tower
Atlanta, Georgia 30303
(404) 688-7530

ATTORNEY FOR RESPONDENT
AND CROSS-PETITIONER
RALPH STUART GRANDERSON

80 pp

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, Petitioner and Cross-Respondent, v. RALPH STUART GRANDERSON, Respondent and Cross-Petitioner.	)	NO. 92-1662

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

COMES NOW Respondent and Cross-Petitioner, RALPH STUART GRANDERSON, by and through his undersigned counsel, and pursuant to Rule 46, Rules of the Supreme Court of the United States, moves this Court for an Order granting him leave to proceed in forma pauperis, and in support thereof shows this Court the following:

1) Mr. Granderson was determined indigent by the lower court, pursuant to Title 18 U.S.C. § 3006(a), and counsel was appointed to represent him on appeal before the United States Court of Appeals for the Eleventh Circuit.

2) Mr. Granderson remains indigent and wishes to respond to the petition for a writ of certiorari filed by the United States of America, and also to cross-petition this Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, which vacated the judgment of the District Court on August 4, 1992.

WHEREFORE, Mr. Granderson respectfully requests that this Court grant his motion and allow him to proceed in forma pauperis.

Dated this 19th day of May, 1993.

Respectfully submitted,

GREGORY S. SMITH
ATTORNEY FOR RALPH STUART GRANDERSON
GEORGIA STATE BAR NO. 658375

Federal Defender Program, Inc.
Suite 3512, 101 Marietta Tower
Atlanta, Georgia 30303
(404) 688-7530

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, Petitioner and Cross-Respondent, v. RALPH STUART GRANDERSON, Respondent and Cross-Petitioner.	)	NO. 92-1662

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

COMES NOW Respondent and Cross-Petitioner, RALPH STUART GRANDERSON, by and through his undersigned counsel, and pursuant to Rule 46, Rules of the Supreme Court of the United States, moves this Court for an Order granting him leave to proceed in forma pauperis, and in support thereof shows this Court the following:

1) Mr. Granderson was determined indigent by the lower court, pursuant to Title 18 U.S.C. § 3006(a), and counsel was appointed to represent him on appeal before the United States Court of Appeals for the Eleventh Circuit.

2) Mr. Granderson remains indigent and wishes to respond to the petition for a writ of certiorari filed by the United States of America, and also to cross-petition this Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, which vacated the judgment of the District Court on August 4, 1992.

WHEREFORE, Mr. Granderson respectfully requests that this Court grant his motion and allow him to proceed in forma pauperis.

Dated this 19th day of May, 1993.

Respectfully submitted,

GREGORY S. SMITH
ATTORNEY FOR RALPH STUART GRANDERSON
GEORGIA STATE BAR NO. 658375

Federal Defender Program, Inc.
Suite 3512, 101 Marietta Tower
Atlanta, Georgia 30303
(404) 688-7530

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO. 92-1662

UNITED STATES OF AMERICA

Petitioner and Cross-Respondent,

v.

RALPH STUART GRANDERSON,

Respondent and Cross-Petitioner.

PROOF OF SERVICE

I, GREGORY S. SMITH, do swear or declare that on this date, May 19, 1993, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and BRIEF IN OPPOSITION TO THE UNITED STATES OF AMERICA'S PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid.

The names and addresses of those served are as follows:

William C. Bryson
Acting Solicitor General
Department of Justice
Washington, DC 20530
(202) 514-2000

Subscribed and sworn to
Before me this 19th day
of May, 1993

GREGORY S. SMITH
Affiant

NOTARY PUBLIC in and for
said County and State

Notary Public, Georgia
My Commission Expires

I.

QUESTION PRESENTED

Whether this Court should grant certiorari to resolve the issue of whether 18 U.S.C. § 3565(a), which requires a probationer who is found to be "in possession" of a controlled substance to be sentenced to one-third of his "original sentence," means that such a probationer must be sentenced to one-third of his term of probation rather than one-third of the original sentence that legally could have been imposed--notwithstanding a clear trend in the United States Courts of Appeal in favor of the latter interpretation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 92-1662

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner and Cross-Respondent,

v.

RALPH STUART GRANDERSON,

Respondent and Cross-Petitioner.

On Petition by the United States of America
for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO UNITED STATES OF AMERICA'S
PETITION FOR A WRIT OF CERTIORARI

Ralph Stuart Granderson, Respondent and Cross-Petitioner in the above-styled action, respectfully opposes the United States of America's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. While the Government correctly notes that the legal question it raises currently is the subject of a split in the United States Circuit Courts of Appeal, the Government fails to adequately note that the clear trend among those circuits has been in favor of Respondent's legal interpretation of this issue, which was adopted by the Eleventh Circuit. When the Government petitioned the Eleventh Circuit for

rehearing or rehearing en banc, not a single member of that Court even requested a polling of its members on the issue. Since that time, two other United States Circuit Courts have issued extensive, well-reasoned published opinions that follow the Eleventh Circuit's interpretation of the law on this issue. Accordingly, Respondent and Cross-Petitioner Granderson requests that the Government's petition for a writ of certiorari be denied.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as United States v. Granderson, 969 F.2d 980 (11th Cir. 1992). The order of the United States District Court for the Northern District of Georgia is unreported. The text of the appellate opinion and the district court's order are included, respectively, as Appendices A and B to the Government's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Prior to this offense, Ralph Stuart Granderson had worked for approximately 5 1/2 years as a mail carrier with the United States Postal Service. This employment followed his honorable discharge from the United States Army. (App., infra, 11a at ¶¶ 41 & 45). Mr. Granderson had no prior record of convictions, juvenile adjudications or even arrests. (App., infra, 8a-9a at ¶¶ 27-31). The Internal Revenue Service confirmed that his income was being reported in annual tax returns. (App., infra, 13a at ¶ 55).

After a postal investigation suggested that Mr. Granderson might be tampering with mail, Mr. Granderson was confronted on June 20, 1990. Although initially denying knowledge of any wrongdoing, he signed a waiver of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and consented to a search of his person. A "test case" letter placed in Mr. Granderson's mail bag by postal inspectors was found in his shoe. (App., infra, 6a-7a at ¶ 13). Mr. Granderson then signed a sworn written statement, in which he acknowledged his criminal activity, and explained that he had taken money from the letters due to his heavy debt. He offered to pay back the money and asked, if possible, that he be allowed to keep his job. (App., infra, 7a at ¶ 14-15).

Mr. Granderson was not allowed to keep his postal job. That same day, he resigned from his position with the Postal Service because of this offense. (App., infra, 7a at ¶ 16). His salary at that point had been $29,881. (App., infra, 11a at ¶ 41). Following this resignation, Mr. Granderson surrendered his only real asset, a truck, to GMAC because he could no longer make payments, and with $26,139.00 in debt, Mr. Granderson was forced to consider filing for Chapter 13 bankruptcy. (App., infra, 13a at ¶¶ 56-57). Mr. Granderson nevertheless did not seek public assistance, but kept working. He was able to find and maintain consistent employment, although his wages dropped to approximately $4.50 per hour. (App., infra, 10a at ¶¶ 38-40). He paid full restitution prior to the time the criminal information was filed.

(App., infra, 7a at ¶ 21). At the car wash job he ultimately landed and held from September 1990 until the time he ultimately was incarcerated for revoking probation, Mr. Granderson's boss stated that his attendance and work habits were good. He was described as one of the company's most reliable employees, his attitude toward customers was described as excellent, and his boss called him a team leader. (App., infra, 10a at ¶ 38).

On January 3, 1991, Mr. Granderson initially appeared in the United States District Court for the Northern District of Georgia. At that time, he agreed to waive indictment and to proceed by way of a criminal information. On January 11, 1991, Mr. Granderson pled guilty to a criminal information charging him with delay or destruction of mail, in violation of 18 U.S.C. § 1703(a). (App., infra, 1a).

Mr. Granderson's Presentence Report ultimately revealed a range under the United States Sentencing Guidelines of zero to six months. (App., infra, 20a). On March 18, 1993, Mr. Granderson was placed on five years' probation by the Hon. William C. O'Kelley. Mr. Granderson also was ordered to pay a $2000 fine and a $50 special assessment. United States v. Granderson, 969 F.2d 980, 981 (11th Cir. 1992).

On June 28, 1991, Mr. Granderson's probation officer filed an application to revoke Mr. Granderson's probation. The petition stated that Mr. Granderson had "possessed/used drugs in that . . . Probationer rendered [two] urine samples which tested positive for cocaine metabolite." (App., infra, 24a).

At a revocation hearing held July 29, 1991, the district court held that Mr. Granderson's use of a controlled substance, as evidenced by his urine samples which had tested positive for cocaine, necessarily meant that he was "in possession" of a controlled substance, requiring the court to sentence him to "not less than one-third of the original sentence." 18 U.S.C. § 3565(a). (App., infra, 35a-36a & 38a).[1] The district judge then noted, "The question is: What was the original sentence? In this case there was no original sentence to jail." (App., infra, 30a-31a).

The Government then explained its position that the five years of probation represented the sentence. (App., infra, 31a). In doing so, the Assistant United States Attorney conceded that "It's very hard and I had difficulty conceptualizing probation as the sentence," but nevertheless stated the Government's position as "that is the interpretation." (App., infra, 31a).

The district court ultimately agreed with the Government, telling Mr. Granderson that "I just don't feel I have any choice but to revoke probation and impose 20 months." (App., infra, 39a). While ruling in this manner, the Court openly stated its belief that the sentence it was imposing was unjust. Some comments were brief. See, e.g., App., infra, 39a ("I have real difficulty with it"); App., infra, 39a ("applying a bunch of numbers in a very

---

[1] The district court's finding, that evidence of drug "use" established through positive urine screens necessarily means that a defendant is "in possession" of a controlled substance, is the subject of Mr. Granderson's cross-petition for a writ of certiorari.

drastic method"); App., infra, 39a ("I would certainly not impose the 20 months under the Guidelines"); App., infra, 39a ("I frankly don't like it"); App., infra, 41a ("it's not an interpretation I like"); App., infra, 42a ("I am very sympathetic with your argument"). Other comments were more direct:

> But 10 times more or a mandatory four times more [than the maximum original sentence the defendant would have received under his sentencing guideline range] is a little harsh. But that's what you get when you start dealing with statistics and mathematics instead of human beings.

(App., infra, 35a).

> There's no other way to describe them other than they're harsh ... even by my standards let me say they're harsh, and my standards are not known to be lenient.

(App., infra, 39a).

> I don't object to your appealing this, certainly. Frankly, I would otherwise sentence him to something in a year range.

(App., infra, 43a).

> I would hope you would appeal it and win. I don't often like to be reversed, but if you did, it would be a case that wouldn't bother me on the interpretation of the law issue.

(App., infra, 43a-44a). The district judge also imposed three years of supervised release to follow Mr. Granderson's term of imprisonment. (App., infra, 42a-43a).

Mr. Granderson appealed his sentence, and the United States Court of Appeals for the Eleventh Circuit ultimately vacated the district court's imposition of 20 months' imprisonment. United States v. Granderson, 969 F.2d 980 (11th Cir. 1992). The court of

appeals noted that "[t]he statute does not specify whether the term 'original sentence' refers to the term of probation or to the range of incarceration established by the Guidelines." Id. at 983. The court of appeals ultimately determined that the better interpretation was the latter.

In reaching this conclusion, the court of appeals considered both the Government's arguments and citations of authority. Although the Government's interpretation of the law at that point represented the majority view, see United States v. Corpuz, 953 F.2d 526 (9th Cir. 1992) and United States v. Byrkett, 961 F.2d 1399 (8th Cir. 1992), and the only contrary opinion came with a dissent, United States v. Gordon, 961 F.2d 426 (3d Cir. 1992), the Eleventh Circuit sided with the Gordon majority and ruled against the Government.

The court of appeals ruled this way for several reasons. First, in part because the term "original sentence" was nowhere defined, the court of appeals found the statute to be ambiguous, and held that the rule of lenity should be considered due to "our reluctance to increase or multiply punishments absent a clear and definitive legislative directive." Id. at 983.

Second, the court of appeals noted that its ruling did not inhibit the Government from seeking more prison time if it were dissatisfied with the sentence Mr. Granderson received:

> He was never convicted or even charged with possession of cocaine. The Government was free to indict him on drug charges but chose not to do so.

Id. at 983.

Third, the court of appeals noted that the United States Sentencing Commission, in following statutory mandates to establish a uniform system of sentencing, had interpreted probation as a trust, and penalties for violations of probation to be sanctions for breaches of that trust rather than sentencings for new criminal conduct. Because Mr. Granderson was facing no more than six months' imprisonment under the Sentencing Guidelines at the time of his initial sentencing, he could not be subjected to more than that for revocation of probation:

> The length of Granderson's original sentence is limited by the Guideline range available at the time he was sentenced to probation. If Granderson could not be subjected to [twenty] months incarceration for the crime of which he was convicted, he cannot now be sentenced to that term for violation of his probation. Moreover, by the Government's contorted mathematics, Granderson would be considered to have had an "original sentence" of sixty months' incarceration, which is not consistent with the Guidelines.

Id. at 983.

Fourth, the court of appeals disagreed with the Government's view that Mr. Granderson's five-year term of probation was the "original sentence" for purposes of 18 U.S.C. § 3565(a):

> Probation and imprisonment are not fungible. As the Third Circuit noted, probation is a form of "conditional liberty" that is likely to be longer than a term of imprisonment. In this case, instead of a possible six months incarceration, Granderson received five years probation, a restraint on his liberty that is less severe than imprisonment, but lasts ten times longer. The trade-off was undoubtedly worthwhile to the defendant and illustrates the fallacy of simply converting a term of probation into one of incarceration without taking these differences into account.

Id. at 984.

Finally, the court of appeals also rejected the Government's claim that § 3565(a) was completely analogous to § 3583(g), which mandates revocation of one-third of a defendant's "term of supervised release" when such a defendant is found to be in the possession of a controlled substance:

> Supervised release . . . is different from probation. When a defendant receives a sentence of probation, it is an alternative to imprisonment; a defendant serving time on supervised release has already served his sentence of incarceration and is subject to supervision analogous to what was formerly called "special parole."

Id. at 984. The court of appeals did not dispute that "Congress intended to prescribe harsh penalties for possession of drugs." Id. at 984. It nevertheless found that its interpretation, which eliminated a judge's discretion to consider lesser alternatives such as continuing, extending or modifying the terms of probation, "produces a strict penalty for violation of probation due to possession of a controlled substance." Id.

The court of appeals ordered Mr. Granderson immediately released from custody. The Government later filed petitions for rehearing and rehearing en banc, both of which were denied. United States v. Granderson, 980 F.2d 1449 (11th Cir. 1992). Following those denials, the Government ultimately filed the instant petition for a writ of certiorari. United States v. Granderson, 61 U.S.L.W. 3741 (U.S. filed April 15, 1993).

SUMMARY OF ARGUMENT

Certiorari is not needed in this case. While a circuit split does exist on the interpretation of the phrase "original sentence" in 18 U.S.C. § 3565(a), the only two circuits that support the Government's position are the first two circuits to have filed final written opinions on the issue. Since that time, more extensive analysis has led every other circuit considering the issue to reject the Government's interpretation of 18 U.S.C. § 3565(a). This analysis has revealed both the logical and practical problems with the Government's analysis. Respondent submits that the true reason for the circuit split may be due to the simple fact that the first two circuits to consider the issue have not yet taken the issue en banc to determine whether their previous panel opinions ought to be overruled in light of the significant recent precedent rejecting their circuits' analysis. This Court's intervention may never be necessary to resolve the conflict among the circuits, and it would be premature for this Court to accept certiorari here.

ARGUMENT

1. This Court should not grant certiorari on this issue. While the Government correctly notes that a split exists among the United States Courts of Appeal over the interpretation of the phrase "original sentence" in 18 U.S.C. § 3565(a), the trend among those circuits is decidedly in favor of Respondent's view. This Court need not settle the circuit conflict at this stage, for Mr.

Granderson submits that the conflict ultimately may be resolved without intervention by the United States Supreme Court.

The trend is decidedly in favor of Mr. Granderson's interpretation of the law. The only two circuit decisions favoring the Government's view are the first two circuits filing final published decisions. United States v. Byrkett, 961 F.2d 1399 (8th Cir. 1992) (per curiam); United States v. Corpuz, 953 F.2d 526 (9th Cir. 1992).[2] Since that time, every other United States Circuit Court of Appeal that has considered the issue has rejected the Government's analysis. United States v. Diaz, 989 F. 2d 391 (10th Cir. 1993); United States v. Clay, 982 F.2d 959 (6th Cir. 1993); United States v. Granderson, 969 F.2d 980 (11th Cir. 1992); United States v. Gordon, 961 F.2d 426 (3d Cir. 1992).

Not only have these panels rejected the Government's view, but also there is reason to believe that support for Mr. Granderson's position is broader. In the instant case, the Government filed an oversized petition for rehearing en banc before the Eleventh Circuit Court of Appeals. Not a single member of panel or the court of appeals in active service even requested a polling on the issue of whether rehearing en banc ought to be granted. United States v. Granderson, 980 F.2d 1449 (11th Cir. 1992) (denying

---

[2] Byrkett was decided April 24, 1992. This was before the Third Circuit issued its final opinion, as amended, in United States v. Gordon, 961 F.2d 426 (3d Cir. 1992) (filed as amended April 30, 1992). While Gordon actually was decided April 13, 1992, Byrkett did not cite Gordon, and there is no indication that the Eighth Circuit was even aware of any conflicting authority on this point when it issued Byrkett. Its relatively short per curiam opinion simply adopted the Ninth Circuit's rule in Corpuz without further analysis.

Government petitions for rehearing and rehearing en banc). In Clay, the Sixth Circuit similarly rejected a Government petition for rehearing en banc. United States v. Clay, 1993 U.S. App. LEXIS 7333 (6th Cir. April 6, 1993) (denying Government petitions for rehearing and rehearing en banc). Two opinions issued in the Tenth Circuit shortly after Diaz similarly may reflect broader support within that circuit for the interpretation of § 3565(a) adopted there. United States v. Roberson, 1993 U.S. App. LEXIS 7496, 1993 WL 103687 (10th Cir. filed April 9, 1993); United States v. Keith, 1993 U.S. App. LEXIS 7716 (10th Cir. filed April 2, 1993).[3]

The only recent development in this area of the law that the Government suggests is favorable to its position is based on its claim that "[t]he Ninth Circuit recently declined to depart from its holding in Corpuz despite the existence of the circuit conflict. See United States v. Avakian, No. 92-10269, 1992 U.S. App. LEXIS 32326 (9th Cir. Dec. 2, 1992)." Government's Petition at 9 note 5. The Avakian opinion cited by the Government, however, involved nothing more than the Avakian panel simply noting that it was bound by the previous panel's decision in Corpuz. Even in that context, Circuit Judge Norris of the Avakian panel specifically noted, in a concurring opinion, that while he agreed Corpuz represented binding precedent on the panel, "I think Corpuz was decided incorrectly." He stated that he believed the "more

[3] One judge in Roberson did write separately, stating that he would have followed the decisions of Corpuz and Byrkett. That judge appears to be the only circuit judge in the country since Gordon was issued in final form to have openly stated support for the reasoning in Corpuz and Byrkett.

sensible approach" was the one adopted by the Third Circuit in Gordon and the Eleventh Circuit in this case.

In light of this open criticism, made even before the Sixth Circuit's Clay opinion and Tenth Circuit's Diaz opinion were issued, it is certainly possible that the Ninth Circuit may reconsider this issue in the near future without any need for this Court to intervene.[4] If it does, the Eighth Circuit's reconsideration of its rule, which was established in a short per curiam affirmance that simply adopted what it apparently believed was the Ninth Circuit's unquestioned rule in Corpuz, would seem not far behind.[5]

[4] While the Ninth Circuit denied petitions for rehearing and rehearing en banc in Avakian, see United States v. Avakian, Appeal No. 92-10269 (9th Cir. Feb. 4, 1993), that denial occurred prior to the Tenth Circuit's Diaz opinion and without reference to Clay. Mr. Avakian admittedly has continued to pursue the issue by filing in this Court a petition for a writ of certiorari, raising both the issue raised by the Government in this petition and the issue raised by Mr. Granderson in his cross-petition. Avakian v. United States, No. 92-8656 (U.S. cert. filed May 5, 1993).

[5] In addition to the growing number of circuits rejecting Corpuz's analysis, the reasoning in Corpuz is internally suspect. As an "additional consideration" which it believed supported its interpretation, Corpuz claimed that the defendant had committed a "Grade A" violation under U.S.S.G. § 7B1.1(a)(1), because the defendant's possession of methamphetamine was a "controlled substance" offense. Corpuz noted that, under the revocation table, a Grade A violation carried a revocation range of 12-18 months, confirming that its 12-month revocation sentence was reasonable.

Corpuz plainly erred in believing that the defendant's violation was a "Grade A" violation. The court apparently failed to examine the definition of a "controlled substance" offense, which exempts simple possession cases from its classification. See infra, at 20 (examining U.S.S.G. § 7B1.1). Thus, rather than supporting the Corpuz analysis, the Guidelines lead to far lower sentences than Corpuz mandated; Corpuz's maximum sentence under the revocation table would have been only 9 or 10 months.

Mr. Granderson submits that the circuits may not truly be as "sharply divided" as the Government suggests in its petition. See Government Petition at 7. Even if the Government is correct that the relevant arguments have been "exhaustively canvassed" by the lower courts as a whole, Government Petition at 9 note 4, these arguments brought out by the recent decisions have never been "exhaustively canvassed" by the Eighth and Ninth Circuits, which were the first to address the issue. If and when they are, Mr. Granderson submits that it is likely these circuits will join the others, and eliminate the circuit conflict. Cf. United States v. Rockwell, 984 F.2d 1112, 1116-17 (10th Cir. 1993), cert. filed on other grounds, No. 92-8557 (U.S. filed Apr. 27, 1992) (overruling United States v. Boling, 947 F.2d 1461 (10th Cir. 1991), following other circuits' rejection of Boling's analysis of the supervised release statute; circuit conflict eliminated). Mr. Granderson disagrees with the Government's contention that "there is no reason to await further consideration of the issue in the lower courts." Government Petition at 9 note 4.

2. All of the Government's arguments brought before this Court have been repeatedly rejected, both directly in recent opinions and indirectly through denials of rehearing en banc. Respondent believes these issues have been reviewed at length in recent cases, and will not take the Court's time to reiterate them here. Instead, Mr. Granderson directs this Court specifically not only to the court of appeals' opinion below, but also to what he submits is perhaps the most comprehensive analysis of this issue,

found in the case of United States v. Clay, 982 F.2d 959 (6th Cir. 1993).

In that case, Ms. Clay initially had been given a three-year term of probation and the district court had imposed a year of imprisonment upon revocation due to her possession of a controlled substance. On appeal, a unanimous panel of the United States Court of Appeals for the Sixth Circuit vacated her sentence and remanded the case for resentencing. The Sixth Circuit rejected the Government's interpretation of this statute and found that the "original sentence" meant the sentence of imprisonment originally available at the time probation was originally imposed, not the "term of probation" imposed on Ms. Clay.

The Sixth Circuit first evaluated the statute itself, utilizing various tenets of statutory construction. These included a view of probation as a "sentence," an examination of the most natural interpretation of the language, a view of this provision in the context of other portions of § 3565(a), and a comparison of this language to the arguably analogous supervised release provision found at 18 U.S.C. § 3583(g). The Sixth Circuit also reviewed the statute in the overall context of the Anti-Drug Abuse Amendment of 1988 which had enacted it into law, evaluated it in terms of maintaining the integrity of the United States Sentencing Guidelines, and considered the possible applicability of the rule of lenity. After conducting this thorough review, the Sixth Circuit ultimately concluded that the better interpretation was the one presented by Ms. Clay, and rejected the Government's analysis.

These general arguments are adequately addressed in the opinions of the Third, Sixth, Tenth and Eleventh Circuits. In addition to these general arguments, however, Mr. Granderson submits the following specific illustrations, which have not been addressed in those decisions. These illustrations reveal the numerous inequities and problems with the Government's interpretation of this law.

Chapter Seven of the Sentencing Guidelines strongly suggests that the Sentencing Commission did not adopt the Government's view of "original sentence." In other contexts, where mandatory minimum sentences exist, the Sentencing Commission has been careful to establish guidelines that track those mandatory minimums. See, e.g., 2D1.1 Background (guideline base offense levels are "proportional to the levels established by statute"). In the case of probation violations, by contrast, simply being "in possession" of a controlled substance, without more, would not represent a "Grade A" violation. See U.S.S.G. § 7B1.1(a)(1) & Application Note 3 (cross-referencing U.S.S.G. § 4B1.2; "controlled substance offense" does not include simple possession). Thus, the Commission's guidelines adopted for Mr. Granderson's alleged possession would be 3-9 months or, at most, 4-10 months -- nowhere near the 20 months the Government recommends.

Indeed, even if Mr. Granderson's probation revocation had been based on distribution of a controlled substance, or aiding and abetting or conspiring in such distribution, all "Grade A" violations obviously far more severe than simple possession,

U.S.S.G. § 7B1.4 would carry a sentencing range upon revocation for Mr. Granderson of only 12-18 months -- still below the mandatory 20 months the Government recommends. In other words, the Government's proposed § 3565(a) interpretation would mandate a more severe sentence for a probationer found in possession of a controlled substance than the Sentencing Commission's suggested sentence for a similar person directly involved in distributing that drug.

The Government's interpretation also would create other inequities. For example, if a first offender charged with a Class E felony had an offense level of 6, his range would be zero to six months. Like Mr. Granderson, that first offender might be placed on five years' probation. If a person with the worst criminal history category of VI had committed the same offense, that person's original sentence guidelines range would be 12-18 months. If that person similarly were shown some leniency and sentenced at the low end of his range, 12 months, no supervised release would be required at all. Even if it were given, no more than one year of supervised release would be possible under U.S.S.G. § 5D1.2(b)(3).

Under the Government's interpretation, this person with the lowest criminal history score would have a higher mandatory term of imprisonment (20 months) and a higher maximum exposure (60 months) than the person with the highest criminal history score (12 months + mandatory 4 months upon revocation; maximum exposure 18 months + 1 year). In fact, the disparity could be even greater, for upon revocation the first offender would, like Mr. Granderson, have a mandatory supervised release term ordered to follow his mandatory

term of imprisonment upon revocation. Such disparities are not rational, and they are not what Congress intended when it enacted this clause of § 3565(a)(2).

The Government's interpretation would cause other problems as well. For example, 18 U.S.C. § 3561(b)(2) authorizes a five-year term of probation for a misdemeanor. By the Government's interpretation, a defendant so sentenced would be statutorily required to spend 20 months in jail if he then possessed illegal drugs -- more than the statutory maximum. Because the mandatory one-third revocation amendment to § 3565(a) post-dates many of these statutory maximums, it arguably would override them, completely redefining the federal misdemeanor classifications.[6]

In addition to these substantive disparities, the Government's interpretation of this statute could create procedural concerns. Normally, a defendant subject to a sentence above his or her guideline range has a right to appeal both the fact and extent of the upward departure. 28 U.S.C. § 3742(a)(3). Thus, if a defendant such as Mr. Granderson had an offense level of six and a

[6] The Government attempts to minimize this problem by generalizing the issue. It suggests that "[i]n some cases--frequently cases involving misdemeanors" the Sentencing Guidelines establish a maximum term of probation of 36 months, meaning that the one-third revocation period it advocates would bring only 12 months. Government's Petition at 8 note 3. The Government's attempt to avoid the specifics of this matter should be recognized by this Court. The guidelines do not tie the maximum term of probation to whether an offense is a felony or a misdemeanor; rather, the maximum term of probation is tied to a defendant's offense level. U.S.S.G. § 5B1.2. Up to five years of probation is authorized for anyone, including a misdemeanant, whose offense level is 6 or higher. The Government does not explain how its interpretation of § 3565(a) prevents misdemeanants from serving more than 12 months in jail.

sentencing guideline range of zero to six months at the time of his initial hearing, and had been sentenced to 20 months in jail, the defendant could appeal that sentence. Even if Mr. Granderson had been in possession of a controlled substance while on bond pending his sentencing, he still would have retained the right to challenge and appeal any upward adjustment in his range or any upward departure from his applicable sentencing guideline range based on this conduct.[7]

If the Government's interpretation of § 3565(a) were adopted, by contrast, Mr. Granderson would not be able to appeal his 20 months in jail. Instead of being viewed as a departure, this lengthy sentence of more than three times his original sentencing range would be based entirely on a mandatory minimum calculation tied to a probationary term that Mr. Granderson was never able to challenge, since the length of probation imposed fell within the guideline range of up to five years' probation. U.S.S.G. § 5B1.2(a)(1). Thus, the Government's interpretation of § 3565(a) is problematic for the additional reason that it cannot be read consistently with the Congressional goal in establishing sentencing appeals in order to eliminate unwarranted sentencing disparities.

[7] The only adjustment that likely would have been affected, if Mr. Granderson had been in possession of illegal drugs while on bond, is that Mr. Granderson might have lost the 2-point downward adjustment he received here for acceptance of responsibility. His offense level would have then been eight, rather than six. Under the current sentencing guidelines, Mr. Granderson's sentencing range still would have been 0-6 months, and a 20-month sentence still would have represented a sizeable upward departure.

In its petition for a writ of certiorari, the Government itself concedes that "[t]he statute contains no definition of the phrase 'original sentence.'" Government's Petition at 10. It further concedes the following:

> To be sure, Congress did not make its meaning as clear in Section 3565(a) as it did in Section 3583(g); Section 3565(a) would have been clearer if Congress had not simply referred to "one third of the original sentence" but had referred instead to "one third of the original sentence of probation."

Government Petition at 12.[8] The Government nevertheless argues that the interpretation of the statute adopted by virtually every circuit judge to examine this issue in the last year is unreasonable.

The consistent recent trend of the circuits away from the Government's view does not represent an "unlikely interpretation of the statute," as the Government suggests. Rather, it represents nothing more than a recognition that this statutory phrase contains some ambiguity, and that various tenets of statutory construction, the rule of lenity, and numerous other arguments mitigate against the harsh and disparate results contained in the Government's interpretation. Cf. United States v. R.L.C., -- U.S. --, 112 S. Ct. 1329, 117 L. Ed. 2d 559 (1992) ("maximum term of imprisonment that would be authorized if [a] juvenile had been tried and

---

[8] Actually, if this had been Congress's intent, it could have been clearer still by not using the phrase "original sentence" at all. It could have used the phrase "sentence of probation," contained in the first clause of § 3565(a)(2), or by mandating revocation for one-third of the defendant's "term of probation," in direct parity with the phrase "term of supervised release," used in § 3583(g), a bill passed in the same Anti-Drug Abuse Act of 1988.

convicted as an adult" in 18 U.S.C. § 5037 refers to sentencing guidelines range, not statutory maximum).

The decisions on this issue by a majority of circuits are consistent with 18 U.S.C. § 3553(a), which requires courts to impose a sentence "sufficient, but not greater than necessary" to achieve the penalogical goals listed, including the need for the sentence imposed to "reflect the seriousness of the offense," to "provide the defendant . . . with needed medical care, or other correctional treatment in the most effective manner," and to "avoid unwarranted disparities." If § 3565(a) had truly been designed to subject a probationer, found in possession of a controlled substance, to 10 times his original exposure, and a mandatory sentence of more than three times his original exposure, these courts reasonably believed that there would have been more than an undefined term and a silent Congressional record. See also 21 U.S.C. § 844 (maximum penalty for conviction of simple possession of controlled substance generally is only one year).

If the recent opinions by the circuit courts of appeal are interpreting § 3565(a) incorrectly, as the Government submits, and Congress wishes to clarify this matter in the manner the Government wishes, it can do so easily. Even prior to that time, if the Government is ever dissatisfied with any sentence received by any probationer found to be in possession of a controlled substance, it can file an additional criminal charge against that person for possession of a controlled substance, possibly obtain a conviction, and seek a sentence of incarceration to run consecutive to the

revocation sentence. See U.S.S.G. § 7B1.3(f) (revocation sentence "shall be ordered to be served consecutively to any sentence of imprisonment the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation"). At present, however, there is no reason for this Court to accept the Government's petition for a writ of certiorari. If, in the future, the Eighth or Ninth Circuits reconsider the matter en banc and still reach a conclusion at odds with the more recent opinions of other circuits, the time may become ripe for this Court's intervention. That time is not here yet, however.

CONCLUSION

Review on writ of certiorari is a matter of judicial discretion and should be granted only when there are special and important reasons for it. U.S. Sup. Ct. Rule 10; Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 73, 75 S. Ct. 614, 99 L. Ed. 897 (1955). Because no such reasons exist here, Respondent Granderson respectfully requests that the Government's Petition for a Writ of Certiorari be denied.

DATED: This 19th day of May, 1993.

Respectfully submitted,

GREGORY S. SMITH
Attorney for Respondent and Cross-Petitioner Ralph Stuart Granderson

No. 92-1662

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner and Cross-Respondent,

v.

RALPH STUART GRANDERSON,

Respondent and Cross-Petitioner.

On Petition by the United States of America for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA

vs. Docket No. 1:91-CR-01
Defendant No. 01

RALPH STUART GRANDERSON, JR.

PRESENTENCE REPORT

Prepared for:	The Honorable William C.O'Kelley United States District Judge
Prepared by:	Rachel A. Scott United States Probation Officer (404) 331-1031
Office Location:	113E
Sentencing Date:	March 18, 1991, 9:00 AM
Offense:	Count 1: Delay or Destruction of Mail, 18 USC §1703(a), a Class D Felony
Plea:	Negotiated Plea of Guilty on January 11, 1991 before Judge O'Kelley
Arrest Date:	Not Arrested
Release Status:	Appearance by summons, no bond required

Identifying Data:

Age:	32
Date of Birth:	June 21, 1958
Dependents:	None
Education:	High School
Race/Sex/Citizenship:	B/M/US
Social Security Number:	226-90-6648
FBI Number:	
USM Number:	

Address:	231 West Hill Street Decatur, Georgia 30030 (404) 378-8040
Detainers:	None known
Assistant U.S. Attorney: Janet King 1800 Richard Russell Bldg. 75 Spring Street, SW Atlanta, Georgia 30303 (404) 331-6183	Defense Counsel: Greg Smith Federal Defender Program, Inc. 101 Marietta Tower, Suite 3310 Atlanta, Georgia 30303 (404) 688-7530
Date report prepared:	February 6, 1991
Revised:	
Mandatory Minimum:	

RE: GRANDERSON, RALPH STUART, JR.

INDEX

PART A - THE OFFENSE

Charge(s) and Conviction(s)

1. This offense occurred after November 1, 1987, therefore, the Sentencing Reform Act of 1984 is applicable.

2. The defendant is solely charged in the one-count Criminal Information No. 1:91-CR-01 in the U.S. District Court, Northern District of Georgia. The information charges that from on or about June 2, 1990 to on or about June 20, 1990, Ralph Stuart Granderson, Jr., while employed as a Postal Service carrier, did unlawfully secret, destroy, detain, delay, and open mail which had been entrusted to him and had come into his possession, that is, eight (8) pieces of first class mail, in violation of 18 USC §1703(a), a Class D Felony.

3. Mr. Granderson entered a negotiated plea of guilty to the one-count information on January 11, 1991 before Judge O'Kelley.

Impact of Plea Agreement

4. In exchange for Mr. Granderson's negotiated plea, the Government will recommend a 2 point reduction for acceptance of responsibility. The Government reserves the right to make all facts known and to make recommendations as to specific characteristics and adjustments listed in the Sentencing Guidelines. The plea agreement is attached to and made part of the presentence report.

5. The plea agreement has no effect on the guideline calculations.

Related Cases

6. None known.

The Offense Conduct

7. Information for the offense conduct section of the presentence report was obtained from the investigative report of Postal Inspector J. Warnock, and the interview with and written statement from the defendant.

8. According to J. Warnock, this investigation began after the U.S. Postal Inspection Service at Atlanta, Georgia, received numerous complaints from postal customers residing on Mr. Granderson's postal carrier route. These complaints were

about non-receipt of mail or mail being received in a rifled condition oftentimes void of cash contents.

9. On or about June 2, 1990, a greeting card addressed to Debra Lynch was received by the customer in a rifled condition and devoid of cash contents ($10).

10. On June 6, 1990, postal inspectors prepared a mailing addressed to Ms. Jackie Morris which included a greeting card and $20 in identifiable U.S. currency. An unattractive mailing was also prepared bearing the address of J. Morris which consisted of a postcard. On June 7, 1990, postal inspectors observed carrier Granderson as he sorted the mail for delivery and noticed that he set aside the Morris letter, not the postcard, in a separate section of his letter case. Granderson was also observed placing the Morris letter with five or six other letters and bundling them with a rubber band. Included in this bundle was a blue greeting card letter addressed to David and Karen McConnell. The McConnell address was not an address that was on Mr. Granderson's route and therefore should have been put in the "throwback case" to be re-sorted. While on his postal route, the defendant was under surveillance by postal inspectors. He delivered only the postcard to the Morris address, not the greeting card letter. Postal inspectors also went through the mail that Mr. Granderson brought in from customers' boxes that day and discovered the greeting card letter addressed to the McConnells (a non-existent address) had been opened.

11. On June 7, 1990, postal inspectors prepared another mailing. This mailing was addressed to Mrs. Teresa Campbell and included a greeting card and $10 of identifiable U.S. currency. An unattractive mailing was also prepared and addressed to Bill Campbell and included a postcard. On June 8, 1990, a postal inspector put the two mailings in carrier Granderson's "hot case" (case containing mail that was put into the throwback case and had been re-sorted and given back out to the carriers). Postal inspectors observed Granderson appropriately case the two Campbell letters. They also observed him handle the Morris letter from the previous day and remove it from the "markups" section of his mail tray. ("Markups" refer to mail not deliverable -- forwarding order expired, no such number, etc.) Since the Morris letter was properly addressed to a valid address, it should not have been in the "markup" section. Carrier Granderson pulled all his "markups" and placed all but the Morris letter into the throwback tray. He returned the Morris letter to a special section of his mail case for mail to be forwarded. Jackie Morris had never filed a change of address form or forwarding

order. The Postal Manager retrieved the Morris letter and found it had been opened and was devoid of the $20 cash contents. Carrier Granderson was under surveillance while on his delivery route. Postal inspectors discovered upon a check of the "Campbell" mailbox that the postcard was delivered but not the greeting card letter. Carrier Granderson returned to the Post Office and left again after casing his mail. While he was gone, a Postal Manager examined the mail around the defendant's carrier case. Granderson had left two bundles of mail on the case ledge and within one of those bundles, the Postal Manager found the Campbell greeting card, opened, with the money still inside. The Postal Manager retrieved the card. When Granderson returned, he asked the Postal Manager if anyone had removed mail from his case.

12. The same or similar method was used by the defendant in the other thefts. A summary of the thefts as listed in the Criminal Information is as follows:

1. Debra Lynch letter on June 2, 1990: Letter rifled with no money inside (there was supposed to be $10).

2. Ms. Jackie Morris test case on June 7, 1990: One card with $20 inside and one postcard. Both were retrieved with no money inside.

3. David & Karen McConnell letter on June 7, 1990: Letter rifled and no money inside.

4. Mrs. Teresa Campbell test case on June 7, 1990: One card with $10 inside and one postcard. Both were left at the Post Office, found opened with money inside.

5. Ms. Jackie Morris letter on or about June 9, 1990: Letter rifled, no money missing.

6. Debra Lynch test case on June 15, 1990: One greeting card and one letter were not delivered. The defendant kept the cards and $30.

7. Karen McConnell test case on June 15, 1990: Card and letter not delivered, missing $20.

8. David McConnell test case on June 20, 1990: Card and $10 not delivered, found on defendant when searched.

13. On June 20, 1990, postal inspectors confronted Granderson and escorted him to the Postal Manager's office where he was advised of his constitutional rights. Granderson voluntarily

signed a Warning and Waiver of Rights. He was advised of the mail theft investigation being conducted and asked what knowledge he had of the David McConnell letter. He stated he did not remember the letter but would have put it in the throwback case. Granderson voluntarily consented to a search of his person and the David McConnell letter was found in his right shoe.

14. Granderson then admitted to the theft and also to other thefts of mail by himself. He gave a sworn statement to the postal inspectors in which he admitted his heavy financial indebtedness was the reason for taking money from letters.

15. He also admitted taking letters "since about the first of the year 1990....to pay bills and buy groceries." Mr. Granderson stated, "I am very sorry for taking letters and money from letters and I only did it because I am heavily in debt and needed the money to pay bills. If possible, I would like to pay back money I have taken from letters and keep my job."

16. Mr. Granderson resigned from the U.S. Postal Service on June 20, 1990.

17. Three separate guidelines are referenced for statute 18 USC §1703. The Probation Officer determined that the guideline for 2B1.1 is most applicable. Guideline 2B1.3 refers to destruction of property. Guideline 2H3.3 refers to obstruction of correspondence and states that if the conduct involved was theft of mail, apply 2B1.1.

18. Under 2B1.1(a), the defendant's base offense level is 4. Under 2B1.1(b)(1)(A), there is no increase in levels for the amount of loss since the loss did not exceed $100.

19. Under 2B1.1(b)(5), the defendant's offense level is increased to 6 since the offense involved the theft of U.S. Mail.

20. The defendant's adjusted offense level is 6.

Victim Impact

21. Full restitution of $80 was made prior to the filing of the Criminal Information.

Role in the Offense

22. Under 3B1.3, the defendant is assessed a 2 level increase for his abuse of a position of trust. The commentary for this guideline states that "the position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons." Mr. Granderson, as a Postal Service mail carrier, was entrusted with the duty of delivering mail. Citizens do not expect their mail to be opened by others, much less, by persons entrusted with the duty of safely delivering their mail to them. The average person is not afforded the opportunity of going through mail casings and picking out cards or letters that appear to have money in them.

23. The defendant's adjusted offense level is 8.

23A. OBJECTION: The defendant objects to the assessment of a two level increase for abuse of a position of trust. The defendant states he was a mail carrier, and that position is no more a position of trust than one held by a bank teller, which the commentary to Guideline 3B1.3 specifically notes is not a position of trust.

23B. RESPONSE: The Probation Officer maintains the defendant should be given the two level increase for his abuse of a position of trust based on reasons given in paragraph 22.

Obstruction of Justice

24. The Probation Officer has no knowledge that the defendant impeded or obstructed justice.

Acceptance of Responsibility

25. The Probation Officer recommends that the defendant be given a 2 level reduction for his acceptance of responsibility under 3E1.1. Mr. Granderson admitted his guilt at the initial interview with the postal inspectors and has already made full restitution.

26. The defendant's total offense level is 6.

PART B - THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudication

27. None.

Criminal Convictions

28. None.

Career Offender

29. Not applicable.

Other Criminal Conduct

30. Not applicable.

Pending Charges

31. None known.

PART C - OFFENDER CHARACTERISTICS

Family Ties and Responsibilities

32. Ralph Stuart Granderson, Jr. was born June 21, 1958, to the union of Ralph (age 66) and Marian (age 61) Granderson in Richmond, Virginia. He has one brother, one sister, and one stepsister from his mother's previous marriage. All of his family live in Richmond, Virginia.

33. The defendant described his home environment as normal in that there were no specific problems in his home. He claims no current religious affiliation though his mother advised that the defendant is a member of the Baptist church. Mrs. Granderson stated she still felt close to her son though they had an argument in December, 1990, and have not spoken since. She stated the defendant gets along with his brothers and sisters and that he can live in her home if he decides to move back to Richmond, Virginia. The defendant's father is a retired occupational therapist and his mother is a retired school custodian.

34. Mr. Granderson is not married and has no children. He currently rents a room at the home of a friend's parents and hopes to move back to Richmond, Virginia following his sentencing date.

Mental and Physical Health

35. The defendant stands 5'4" tall, weighs 150 pounds, has black hair, brown eyes, and a scar on the inside of his right arm. The defendant reports no mental or physical health problems either past or present and his mother confirmed that also.

Substance Abuse

36. The defendant was advised by his attorney not to discuss any substance abuse. The defendant's mother stated she was not aware of any illicit drug use by the defendant. She stated that the defendant does drink beer but she is not aware of any alcohol abuse.

Education and Vocational Skills

37. Mr. Granderson left high school in the eleventh grade to join the Army. He received his high school diploma while in the Army in 1978, and states he attended a one quarter computer course at Massey Business College in Atlanta, Georgia from October, 1983 to January, 1984.

Employment

Employment Status:

Employment at Time of Arrest: Employed.

Employment at Time of Sentencing: Employed.

Occupation: Car wash attendant.

Employment History:

38. September, 1990 to Present: Calibur Car Wash, Stone Mountain, Georgia. Employed as a car wash attendant making $4.50 per hour. His current boss reports that Mr. Granderson's work attendance is good and he is always at work when needed. He also states that Mr. Granderson is one of the most reliable men that he has working for him and works up to the standards that his company requires. His attitude toward customers and other employees is excellent and Mr. Granderson is considered a team leader in the car wash and handles his position professionally.

39. July, 1990 to September, 1990: ARC Security, Atlanta Airport, Atlanta, Georgia. Employed as a security guard making $4.50 per hour. The defendant states he left this job to go to work at the car wash.

40. From June, 1990 to July, 1990: Action Temporary Service, Atlanta, Georgia. The defendant states he worked on a communications technician assignment for one month making $5.00 per hour. At the same time, he delivered newspapers for

the Atlanta Journal-Constitution for three days but left this job because he "couldn't stay awake." Mr. Granderson left Action Temporary Services to go to work for ARC Security at the Atlanta Airport.

41. From December, 1984 to June, 1990: U.S. Post Office, Atlanta, Georgia. Employed as a mail carrier making $29,881 per year base salary. The defendant resigned from this position due to the instant offense.

42. From January, 1984 to February, 1985: Holiday Inn, Atlanta, Georgia. Employed as a dishwasher, then bellman, then front desk clerk, making $4.25 per hour. The defendant reports he worked full-time until hired by the U.S. Post Office. He continued to work at the Holiday Inn part-time (as a second job), until February, 1985.

43. From October, 1983 to January, 1984: United Parcel Service, Atlanta, Georgia. Employed in the shipping and packaging department as a temporary worker while in college making $9.00 per hour.

44. From May, 1983 to October, 1983: Unemployed and moved to Atlanta, Georgia from Richmond, Virginia. The defendant was still in the Army Reserves and received some income from the Army.

45. From May, 1980 to May, 1983, the defendant was enlisted full-time in the Army. The defendant obtained the rank of E-5 - Sergeant, received the Good Conduct medal and the Meritorious Service medal. He was discharged from the Army with an honorable discharge in May of 1983, and continued in the Army Reserves.

46. From November, 1979 to May, 1980: Miller and Rhodes Department Store, Richmond, Virginia. The defendant states he worked delivering furniture making minimum wage and left this job to go back into the Army full-time.

47. From November, 1976 to November, 1979, the defendant was enlisted full-time in the Army.

Financial Condition

48. The information for the financial section of the presentence report was obtained from the defendant's self-reporting, Credit Bureau report, and the Internal Revenue Service.

	ASSETS	
	Cash	-0-
	Unencumbered Assets	-0-
	Encumbered Assets	-0-
49.	TOTAL ASSETS	-0-
	LIABILITIES	
	Unsecured Debts	
	Credit accounts	$ 8,388.00
	Utility bills	96.00
	Past due apartment rent	384.00
	Health services	271.00
	GMAC (truck)*	17,000.00
	Secured Debts	-0-
50.	TOTAL LIABILITIES	$26,139.00
51.	NET WORTH	-$26,139.00
	MONTHLY CASH FLOW	
	Income	$ 450.00
52.	TOTAL INCOME	$ 450.00
	Necessary Living Expenses	
	Rent	$ 200.00
	Groceries	300.00
	Installment payments	315.00
	Transportation	50.00
53.	TOTAL EXPENSES	$ 865.00
54.	MONTHLY CASH FLOW	- $ 415.00

55. Internal Revenue Service records reflect the following adjusted gross incomes for Mr. Granderson for the years 1986 through 1989:

1989: $30,364
1988: $28,616
1987: $26,081
1986: $24,713

56. *The defendant voluntarily surrendered his truck to GMAC (financer) in August, 1990 because he could no longer make the payments. Once GMAC sells the truck, Mr. Granderson will be responsible for the balance owed on the loan. At present, GMAC has not sold the truck and Mr. Granderson owes $17,000 on the loan.

Analysis

57. The defendant is in poor financial shape and is in the process of filing a Chapter 13 bankruptcy. He does plan to receive $1,600 from his Thrift Savings Plan with the U.S. Postal Service, but this is minimal compared to what his current debts are.

58. Mr. Granderson should be able to pay a fine within the guideline range during a term of supervision.

Criminal Livelihood

59. Not applicable.

PART D - GUIDELINE APPLICATION

See Attached Guideline Worksheets.

WORKSHEET A (OFFENSE LEVEL)

1991 February 6th 03:55

Defendant GRANDERSON, RALPH

District/Office 3E
Docket Number 91- 1- 1
Date of Instant Offense 6/20/90

Group Number 1
Number of counts 1

U.S. Code Title & Section - 18.1703

1. OFFENSE LEVEL

Guideline	Description	Level
2B1.1(a)	Theft	4
	Specific Offense Characteristics	
(b)(1)	$ 100.00	+0
(b)(4)	Was undelivered U.S. mail taken? Yes.	+2
(b)(5)	Did the offense involve more than minimal planning? No.	+0
(b)(6)	Did the offense involve organized criminal activity? No.	+0
(b)(7)	Did offense jeopardize safety/soundness of financial institution? No.	+0
	Sum of Base Level and Specific Offense Characteristic Adjustments	6

2. Victim Related Adjustments

No Applicable Victim Related Adjustments

3. Role in the Offense Adjustments

3B1.3	- Abused position of trust or special skill	+2

4. Obstruction Adjustment +0

5. Reckless Endangerment Adjustment +0

6. Adjusted Offense Level 8

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)

1991 February 6th 03:55

Defendant GRANDERSON, RALPH

District/Office 3E
Docket Number 91- 1- 1
Date of Instant Offense 6/20/90

1.	Adjusted Offense Level for Group 1	8	1.0 units
2.	Total Units		1.0 units
3.	Increase in Offense Level Based on Total Units		0
4.	Highest of the Adjusted Offense Levels		8
5.	Combined Adjusted Offense Level		8

WORKSHEET D (GUIDELINE WORKSHEET)

1991 February 6th 03:55

Defendant GRANDERSON, RALPH

District/Office 3E
Docket Number 91- 1- 1
Date of Instant Offense 6/20/90

1. Adjusted Offense Level	8
2. Acceptance of Responsibility	-2
3. Offense Level Total	6
4. Criminal History Category	I
5. Career Offender/Armed Career Criminal/Criminal Livelihood	
a. Offense Level Total	6
b. Criminal History Category	N/A
6. Guideline Range from Sentencing Table	0 - 6

WORKSHEET D (CONTINUED)

7. Probation

a. Imposition of a Sentence of Probation

Minimum is zero--probation authorized

A. Length of Term of Probation

Offense Level is six or more--probation length is one to five year

B. Condition of Probation

Offense Level is six or more--probation length is one to five year

b. Conditions of Probation

(1) Confined to judic'l district
(2) Report to probation officer
(3) Truthfully answer questions
(4) Support dependants
(5) Work at lawful occupation
(6) Report change of residence
(7) Restrict'ns on alcohol/drugs
(8) Avoid places where drugs sold
(9) Avoid criminal associates
(10) Allow visits by probation officer
(11) Report all police contacts
(12) Consent needed to act as informer
(13) Notify third parties
(21) Community service
(22) Occupational restrictions
(23) Substance abuse programs

8. Sentence under 5C1.1 (c)(3) and (d)(2)

Minimum is zero--intermediate sentence not authorized

9. Supervised Release

a. Imposition and Length of a Term of Supervised Release
24 to 36 Months (see 5D1.1, 5D1.2)

b. Conditions of Supervised Release (see 5D1.3)

WORKSHEET D (CONTINUED) E

10. Restitution remaining to be paid:			$ 0.00
Restitution already paid:			$ 80.00
11. Fines			
	Minimum		Maximum
1. Statutory Maximum of any single count in excess of $250000			$ 0.00
2. Fine Table	$ 500.00		$ 5000.00
3. Defendants Gain less Restitution	$ 0.00		
4. Gain to all Participants (x3)			$ 240.00
5. Victim's loss (x2)			$ 160.00
6. Guideline range	$ 500.00		$ 5000.00
7. Cost of Imprisonment	$ 1415.00	X 12	$ 16980.00
Cost of Probation/Special Parole			$ 1160.00
Cost of Community Confinement			$ 11487.00
12. Special Assessments (see 5E1.3)			$ 50.00
13. Departures Applicable for the Unusual Cases			

SENTENCING OPTIONS

DEFENDANT:	RALPH STUART GRANDERSON, JR.
OFFENSE:	Count 1: Delay or Destruction of Mail, 18 USC §1703(a), a Class D Felony
PLEA/VERDICT:	Negotiated Plea of Guilty before Judge O'Kelley on January 11, 1991

SENTENCING OPTIONS:

Statutory Penalty:	5 years/$250,000 fine
Total Offense Level:	6
Criminal History Category:	I
Custody Guideline Range:	0 - 6 months
Fine Guideline Range:	$500 - $5,000
Restitution:	Already paid
Special Assessment:	$50
Cost of Imprisonment\Supervision:	$16,986.72/$1,160 yearly
Probation Option:	Yes, 1 to 5 years
Supervised Release:	2 to 3 years

UNRESOLVED GUIDELINE ISSUES:

1. Abuse of Position of Trust.

Respectfully submitted,

Rachel A. Scott

Rachel A. Scott
U. S. Probation Officer

I have reviewed the presentence report and agree with its findings of fact, conclusions of law and sentencing recommendations; and state that to the best of my knowledge, the findings of fact, conclusions of law and sentencing recommendations of this report are not inconsistent with any other presentence report in this case.

Riley W. Erwin

Riley W. Erwin
Supervising United States
Probation Officer

RAS/rh

ADDENDUM TO PRESENTENCE REPORT

United States vs. Granderson, Ralph Stuart, Jr., Docket No. 1:91-CR-01-01
U. S. District Court, Northern District of Georgia

The Probation Officer certifies that the Presentence Report, including any revision thereof, has been disclosed to the defendant, his attorney, and the counsel for the Government, and that the content of the Addendum has been communicated to counsel.

OBJECTIONS

By the Government

The Government has filed one objection not effecting the guideline calculations. The objection refers to an incorrect statement in paragraph 12, item 7, where the report states $10 was missing from the McConnell letter. The correct amount of missing currency is $20.

The Probation Officer notes the error and has corrected the report to read $20. Also, in paragraph 21, the correct amount of restitution paid by the defendant was noted as $70 and should be $80. That also has been corrected in the report.

By the Defendant

The defendant, through his counsel, has submitted one objection which would have an effect on the guideline calculations.

1. Abuse of position of trust -- addressed following paragraph 23.

Objections not having an effect on the guideline calculations:

1. The defendant believes the details described in paragraphs 8 through 11 overstate the seriousness of the offense and that paragraph 12 best summarizes the total offense conduct.

2. The defendant submits that Guideline 2H3.3 should apply in that the Government agreed to that at the time the defendant waived indictment.

The Probation Officer determined that 2H3.3(b)(2) was applicable with the resulting offense level (using 2B1.1) of 6. The defendant states that 2H3.3(b)(3) is applicable with a resulting offense level (using 2B1.3) of 6.

3. The defendant wishes to clarify his comment in paragraph 40 where he stated he quit his job at the Atlanta Journal-Constitution because "he couldn't stay awake". The defendant feels that statement might be erroneously viewed as evidence of laziness when, in fact, the job entailed pre-dawn driving and he quit in large part because of legitimate safety concerns.

4. The defendant objects to the conclusion in paragraph 58 that he could pay a fine at the low end of the guideline range.

5. The defendant objects to the worksheet D, possible special conditions of community service, occupational restrictions, and substance abuse programs.

Respectfully submitted,

Rachel A. Scott

Rachel A. Scott
U. S. Probation Officer

Reviewed and Approved:

Riley W. Erwin

Riley W. Erwin
Supervising U.S. Probation Officer

APPENDIX B

PROB 12

UNITED STATES DISTRICT COURT
for
THE NORTHERN DISTRICT OF GEORGIA

U.S.A. vs. Ralph Granderson Docket No. 1:91-CR-01-01

Petition on Probation and Supervised Release

COMES NOW James G. Heflin, Jr. PROBATION OFFICER OF THE COURT presenting an official report upon the conduct and attitude of probationer Ralph Granderson who was placed on probation by the Honorable William C. O'Kelley sitting in the court at Atlanta, on the 18th day of March, 1991, who fixed the period of probation supervision at five years, and imposed the general terms and conditions of probation theretofore adopted by the court and also imposed special conditions and terms as follows:

The defendant is prohibited from possessing a firearm or other dangerous weapon.

The defendant shall participate, if any time being necessary and required to do so, in any program approved by the U. S. Probation Office for substance abuse, which may include testing to determine whether the defendant has reverted to the use of alcohol or drugs.

RESPECTFULLY PRESENTING PETITION FOR ACTION OF COURT FOR CAUSE AS FOLLOWS:

Probationer has possessed/used drugs in that on 5-10-91 and 6-7-91, Probationer rendered urine samples which tested positive for cocaine metabolite.

PRAYING THAT THE COURT WILL ORDER Ralph Granderson to appear in Court in Atlanta, Georgia, in Courtroom 1906, 75 Spring Street, S.W., on July 29, 1991, at 10:30 A.M. to show cause why his probation should not be revoked.

ORDER OF COURT

Considered and ordered this 19th day of July 1991 and made a part of the records in the above case.

William C. O'Kelley

William C. O'Kelley
United States District Judge

Respectfully,

James G. Heflin, Jr.

James G. Heflin, Jr.
United States Probation Officer
Atlanta, Georgia

Date: June 28, 1991

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
VS.	)	
	)	NUMBER 1:91-CR-1-WCO
RALPH STUART GRANDERSON	)	

* * *

TRANSCRIPT OF REVOCATION OF PROBATION BEFORE THE HONORABLE WILLIAM C. O'KELLEY, CHIEF UNITED STATES DISTRICT JUDGE, ON MONDAY, JULY 29, 1991, IN COURTROOM 1906, NINETEENTH FLOOR, UNITED STATES COURTHOUSE, IN ATLANTA, FULTON COUNTY, GEORGIA, IN THE ABOVE-STYLED ACTION.

* * *

APPEARANCES OF COUNSEL:

FOR THE UNITED STATES: JANET KING

FOR THE DEFENDANT: GREGORY SMITH

* * *

DENNIS J. REIDY
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
1949 U. S. DISTRICT COURTHOUSE
75 SPRING STREET, S.W.
ATLANTA, GEORGIA 30303
(404) 331-3724

(IN ATLANTA, FULTON COUNTY, GEORGIA; MONDAY, JULY 29, 1991; 10:30 A.M.; IN OPEN COURT.)

THE COURT: IS GRANDERSON IN CUSTODY?

MR. SMITH: NO. HE'S OUT HERE.

THE COURT: ALL RIGHT.

THE CLERK: CALL THE CASE UNITED STATES OF AMERICA VERSUS RALPH GRANDERSON, CRIMINAL NUMBER 1:91-01. IS THE GOVERNMENT READY?

MS. KING: THE GOVERNMENT'S READY, YOUR HONOR.

THE COURT: MR. SMITH, ARE YOU READY? YOU'VE GOT THIS ONE ALSO?

MR. SMITH: YES, YOUR HONOR.

THE COURT: ALL RIGHT. ALL RIGHT, HAVE YOU RECEIVED A COPY OF THE GOVERNMENT'S APPLICATION FOR PROBATION REVOCATION IN THIS CASE?

MR. SMITH: YES, YOUR HONOR.

THE COURT: HOW DO YOU RESPOND TO IT?

MR. SMITH: YOUR HONOR, WE ADMIT THE CHARGE.

THE COURT: YOU ADMIT THE CHARGES?

MR. SMITH: YES, YOUR HONOR.

THE COURT: ALL RIGHT. MR. GRANDERSON, IS THERE ANY REASON THAT THE COURT SHOULD NOT REVOKE THE PROBATION IN THIS CASE?

OR IS THERE ANY REASON YOU WISH TO STATE, MR. SMITH?

MR. SMITH: I'M SORRY. JUST ONE MINUTE.

YOUR HONOR, I THINK THAT THE POINTS WE WOULD WANT TO MAKE ARE THESE. AS YOUR HONOR MAY KNOW, WE BELIEVE THE COURT HAS DISCRETION TO IMPOSE A SENTENCE IN THIS CASE. AS I UNDERSTAND IT -- I GUESS MAYBE I SHOULD START WITH ASKING WHAT THE GOVERNMENT INTENDS TO SEEK IN THIS CASE.

MS. KING: YOUR HONOR, THE GOVERNMENT'S POSITION IS THAT AS PLED BY THE PETITION FOR REVOCATION, THAT THE DEFENDANT HAS POSSESSED OR THE PROBATIONER HAS POSSESSED AND USED DRUGS. IF THE COURT MAKES THAT FINDING, THERE IS A MANDATORY REVOCATION UNDER 3565 SUBSECTION (A), THAT THE COURT WOULD HAVE TO REVOKE AND IMPOSE AT LEAST ONE-THIRD OF THE FIVE-YEAR ORIGINAL SENTENCE. THEREFORE, THAT WOULD BE THE COURT'S POSITION -- THE GOVERNMENT'S POSITION, EXCUSE ME -- THAT THE COURT UNDER THESE FACTS MUST REVOKE UNDER THE STATUTE AND IMPOSE NOT LESS THAN 20 MONTHS.

MR. SMITH: YOUR HONOR, PERHAPS I SHOULD CLARIFY THE ADMISSION THEN. MR. GRANDERSON ADMITS USE OF DRUGS BUT DOES NOT ADMIT POSSESSION IN THE TERMS THAT THE GOVERNMENT HAS INDICATED, AND I BELIEVE THAT IN CIRCUMSTANCES WHERE THE USE IS INDICATED FROM THE DRUG TESTING, WHICH IT WAS HERE, THE COURT HAS THE DISCRETION NOT TO IMPOSE THE MANDATORY ONE-THIRD, AND THAT'S WHAT WE WOULD ASK THE COURT TO DO HERE.

IF THE COURT MAY RECALL, MR. GRANDERSON HAS NO PRIOR CRIMINAL HISTORY AT ALL EXCEPT FOR THE UNDERLYING OFFENSE, WHICH DID NOT RELATE TO DRUGS AT ALL. IT WAS MAIL THEFT. DURING THE

PRETRIAL SERVICES' REPORT MR. GRANDERSON WAS OUT ON BOND FOR A SUBSTANTIAL PERIOD OF TIME, HAD NO PROBLEMS WHATSOEVER, WAS DRUG TESTED PERIODICALLY DURING THAT TIME, NEVER TESTED POSITIVE AT ALL. NO INDICATION HE'S EVER HAD ANY DRUG PROBLEMS. THIS RELATED TO A MISTAKE HE MADE IN TERMS OF GETTING I GUESS IN A SORT OF PARTY SETTING AND DOING SOMETHING HE SHOULDN'T HAVE, BUT WE SUBMIT THAT 20 MONTHS WOULD BE UNDULY HARSH, GIVEN HIS BACKGROUND AND THE CIRCUMSTANCES, AND WE WOULD ASK THE COURT THAT THE COURT IMPOSE A SENTENCE BELOW THE 20 MONTHS REQUESTED BY THE GOVERNMENT.

IN THE CASE OF UNITED STATES VERSUS SMITH, WHICH IS AN ELEVENTH CIRCUIT CASE FROM LAST YEAR, 907 F. 2D 133, THE COURT TALKS ABOUT WAYS TO DO REVOCATION UNDER THE GUIDELINES. THIS WAS BEFORE THE NEW GUIDELINE HAD BEEN IMPLEMENTED WHICH SAID WHERE WITHIN THE RANGE THE COURT OUGHT TO IMPOSE SENTENCE, AND THE SMITH CASE SAID THAT THE COURT SHOULD GO BACK TO THE ORIGINAL SENTENCING RANGE, WHICH IN THIS CASE WOULD BE ZERO TO SIX MONTHS, AND IMPOSE A SENTENCE WITHIN THAT RANGE. I THINK THAT THE SMITH CASE MAY NOT BE APPLICABLE NOW THAT THE GUIDELINES HAVE INDICATED SPECIFIC REVOCATION GUIDELINES AS WELL, BUT NEVERTHELESS AT LEAST UNDER SMITH THE COURT AT THAT TIME PERHAPS COULD HAVE BEEN LIMITED TO THE ZERO TO SIX MONTH RANGE.

BECAUSE HE'S A CRIMINAL HISTORY CATEGORY 1, I WOULD ALSO NOTE TO THE COURT THAT BUT FOR THE MANDATORY REVOCATION, ASSUMING THAT THIS WOULD BE A GRADE (C) VIOLATION, A TECHNICAL

VIOLATION -- AT LEAST IN TERMS OF PAROLE REVOCATION, DRUG USE IS A TECHNICAL VIOLATION -- HIS RANGE WOULD BE THREE TO NINE MONTHS. SO, AGAIN, YOUR HONOR, WE'RE TALKING ABOUT RANGES WELL BELOW THE 20 MONTHS THAT THE GOVERNMENT'S SEEKING IN THIS CASE.

WE SUBMIT THAT THE COURT, GIVEN MR. GRANDERSON'S GOOD BACKGROUND -- HE'S BEEN A HARD-WORKING FELLOW FOR A LONG TIME AND HE'S NEVER BEEN IN TROUBLE BEFORE IN HIS LIFE UNTIL THIS UNDERLYING OFFENSE AND VIOLATION. HE'S NOT PARTICULARLY A YOUNG MAN EITHER, SO HE'S LED A GOOD LIFE FOR A SUBSTANTIAL PERIOD OF TIME. WE ASK THE COURT TO EXERCISE ITS DISCRETION, TO FIND THAT THE USE WAS DEMONSTRATED BY MR. GRANDERSON'S DRUG TESTING ONLY AND EXERCISE ITS DISCRETION TO GO BELOW THE 20 MONTHS AND IMPOSE A SENTENCE THAT MIGHT BE MORE APPROPRIATE IN THIS CASE. HE'S NEVER BEEN TO PRISON, AND WE SUBMIT THAT 20 MONTHS IS A SUBSTANTIAL PERIOD OF TIME FOR A DRUG TEST.

MS. KING: YOUR HONOR, THE GOVERNMENT'S POSITION IS THAT THERE'S NO WAY THAT MR. GRANDERSON USED THE DRUGS UNLESS HE POSSESSED THEM AND THAT IT WOULD BE APPROPRIATE FOR THE COURT TO FIND THAT HE WAS IN POSSESSION OF THE DRUG, IN VIOLATION OF THE GUIDELINES AND IN VIOLATION OF THE STATUTE, AND SHOULD THEREFORE APPLY THE MANDATORY REVOCATION.

FOR THE RECORD, I'D LIKE THE COURT TO NOTE THAT THE GOVERNMENT'S POSITION IS THAT ACCORDING TO OUR REVIEW OF THE SMITH DECISION AND DISCUSSIONS WITH THE DEPARTMENT OF JUSTICE, WOULD BE THAT THE COURT WOULD HAVE TO ABIDE BY UNITED STATES

VERSUS SMITH IF YOU DO NOT FIND A MANDATORY REVOCATION AND THEREFORE THE SENTENCE WOULD HAVE TO BE IMPOSED WITHIN THE ORIGINAL GUIDELINE RANGE OF ZERO TO SIX MONTHS. IF THE COURT FELT THAT THAT WAS NOT APPROPRIATE, I DID WANT TO LET THE COURT KNOW THAT I SPOKE WITH MR. HEFLIN, AND THE PROBATION OFFICE'S FIGURES THAT THEY PROVIDED TO YOU UNDER CHAPTER 7 OF 12 TO 18 MONTHS OF REVOCATION ARE INCORRECT. THEY HAD FIGURED THAT THE POSSESSION OR THE USAGE OF THE COCAINE WOULD BE A FELONY. OF COURSE, AS THE COURT'S AWARE, THAT'S ONLY A MISDEMEANOR. SO, THE CHAPTER 7 GUIDELINES ARE THREE TO NINE MONTHS, AS MR. SMITH NOTED.

THEREFORE, THE THREE POSSIBILITIES IN THIS CASE ARE THAT THE COURT WOULD FIND THAT THE USE OF THE DRUGS AS ADMITTED BY THE DEFENDANT CONSTITUTED POSSESSION AND REVOKE FOR THE 20 MONTHS OR APPLY SMITH. THAT WOULD BE -- THE ZERO TO SIX MONTHS WOULD BE THE RANGE, UNLESS THE COURT FELT THAT SMITH WAS NOT BINDING ON YOU, AND YOU WOULD APPLY CHAPTER 7, WHICH WOULD BE THREE TO NINE MONTHS.

THE COURT: JUST A MINUTE. LET ME REVIEW SOMETHING.

MS. KING: ALL RIGHT, SIR.

THE COURT: I'M NOT SURE THAT I AGREE WITH THE INTERPRETATION OF THE MANDATORY REVOCATION AND SENTENCE TO AT LEAST ONE-THIRD OF THE ORIGINAL SENTENCE. I DON'T QUARREL WITH THAT PRINCIPLE OF LAW. THE QUESTION IS: WHAT WAS THE ORIGINAL SENTENCE? IN THIS CASE THERE WAS NO ORIGINAL SENTENCE TO JAIL.

HAS THAT BEEN INTERPRETED TO BE THE MINIMUM SENTENCE --

MS. KING: NO, YOUR HONOR.

THE COURT: -- AUTHORIZED BY STATUTE, WHICH WAS FIVE YEARS?

MS. KING: YOUR HONOR, IF THE COURT -- LET ME SEE IF I CAN FIND IT. THERE IS NO LONGER UNDER THE GUIDELINES WHERE THE COURT SUSPENDS IMPOSITION OF SENTENCE.

THE COURT: I REALIZE THAT. THAT WAS THE OLD WAY OF DOING IT.

MS. KING: RIGHT. FIVE YEARS WAS THE SENTENCE. THE COURT ALLOWED IT TO BE SERVED ON PROBATION. IT IS THE GOVERNMENT'S POSITION THAT THE ORIGINAL PROBATION PERIOD OF FIVE YEARS WAS THE ORIGINAL SENTENCE, AND I'LL REFER THE COURT TO SECTION 3561 OF TITLE 18 THAT INDICATES THAT A PERIOD OF PROBATION CONSTITUTES A SENTENCE. GUIDELINE SECTION 7A2, LITTLE (A), PROVIDES THAT A PERIOD OF PROBATION UNDER THE GUIDELINES IS A SENTENCE. THEREFORE, IN INTERPRETING 3565, THE GOVERNMENT'S POSITION WOULD BE THAT THE PROBATED SENTENCE THAT THE COURT GAVE IS THE ORIGINAL SENTENCE THAT IS REFERRED TO IN THE REVOCATION LANGUAGE, A PERIOD OF PROBATION. IT'S VERY HARD AND I HAD DIFFICULTY CONCEPTUALIZING PROBATION AS THE SENTENCE, BUT THAT IS THE INTERPRETATION.

THE COURT: WELL, THAT'S BEEN THE CONCEPT IN THE STATE COURT SYSTEM IN THE PAST, SO I DON'T HAVE MUCH TROUBLE UNDERSTANDING IT. I DON'T LIKE THE ANALYSIS, BUT I DON'T HAVE

ANY PROBLEM UNDERSTANDING THAT'S WHAT THEY'RE SAYING. THAT'S THE WAY I THINK THE STATE COURT SENTENCES HAVE OPERATED FOR YEARS; THAT WHATEVER THE PROBATIONARY TERM WAS, THAT WAS THE SENTENCE, I BELIEVE. THAT AGAIN IS WHERE WE'VE GOTTEN AWAY FROM THE TRADITIONAL OLD FEDERAL SYSTEM, WHICH I THOUGHT WAS A FAIRER, MORE PROGRESSIVE SYSTEM, BECAUSE FRANKLY HAD I BEEN GOING TO SENTENCE HIM TO JAIL, I WOULDN'T HAVE SENTENCED HIM TO FIVE YEARS. SO, I GIVE HIM A BREAK AND SENTENCE HIM TO FIVE YEARS PROBATION, AND NOW WHEN HE VIOLATES IT HE'S SUBJECTED TO FOUR TIMES WHAT HE WOULD HAVE BEEN -- WELL, MORE THAN THAT REALLY. 10 TIMES. HE'S SUBJECTED UP TO FIVE YEARS, 60 MONTHS; WHEREAS, OTHERWISE HE WOULD HAVE BEEN SUBJECTED ONLY TO SIX MONTHS. SO IT'S 10 TIMES AS MUCH. THERE'S JUST SOMETHING WRONG WITH THAT, BUT THERE'S A LOT WRONG WITH THE GUIDELINES. I WILL RETIRE FROM THIS COURT BEFORE ANYBODY EVER CONVINCES ME THAT THEY'RE FAIR.

MR. SMITH: WELL, IN THIS CASE, YOUR HONOR, I THINK THE GUIDELINES GIVE THE COURT AN OUT. IN APPLICATION NOTE 5 TO 7B1.4, AFTER CITING THE STATUTORY PROVISIONS ABOUT THE MANDATORY ONE-THIRD, IT STATES AS FOLLOWS: THE COMMISSION LEAVES TO THE COURT THE DETERMINATION OF WHETHER EVIDENCE OF DRUG USAGE ESTABLISHED SOLELY BY LABORATORY ANALYSIS CONSTITUTES, QUOTE, POSSESSION OF A CONTROLLED SUBSTANCE, END QUOTE, AS SET FORTH IN THE STATUTES. AND, YOUR HONOR, WHILE IT MAY --

THE COURT: I HAVE DIFFICULTY WITH THAT AND THAT'S THE SAME WAY THE COMMISSION -- YOU KNOW, THEY COMPROMISE THEIR

PRINCIPLES. I'VE HEARD THOSE COMMISSIONERS SAY, "OH, YOU'RE NOT BOUND BY THESE GUIDELINES. YOU CAN DEPART WHENEVER YOU WANT TO." WELL, THAT'S NOT WHAT THEY SAY AND THAT'S NOT WHAT THE LAW SAYS AND I'VE NOT DONE THAT. THEY'VE WRITTEN THEM ONE WAY AND THEN THEY TELL US SOMETHING DIFFERENT AND I DON'T AGREE WITH THEM. EVEN THOUGH I DON'T LIKE THE GUIDELINES, I INTEND TO APPLY THEM AS I UNDERSTAND THEM AS BEST I CAN. NOW, WHAT YOU'RE SAYING HERE IS THEY HAVE SAID THIS IS THE GUIDELINE, BUT IF YOU'RE WILLING TO COMPROMISE YOUR FINDINGS -- AND THAT'S IN EFFECT WHAT YOU'RE DOING IN MY JUDGMENT. IF YOU'VE TAKEN DRUGS AND YOU HAVE IT IN YOUR SYSTEM, THEN YOU'VE POSSESSED THOSE DRUGS. THEY'RE SAYING, "WELL, YOU CAN FIND DIFFERENTLY." WELL, I HAVE DIFFICULTY WITH THAT.

MR. SMITH: I UNDERSTAND THE COURT'S FEELING. I GUESS MY THOUGHT IS AS TO WHY THE COMMISSION DID THAT IS THIS: IT'S A POLICY DETERMINATION. I THINK FINDING SOMEONE IN POSSESSION IS ACTUALLY VIEWED AS WORSE THAN ACTUALLY HAVING THEM AND USED IT; AND WHAT WAS IT THAT CONGRESS MEANT WHEN THEY SAID POSSESSION OF A CONTROLLED SUBSTANCE? IF YOU FIND SOMEBODY IN POSSESSION, WELL, THEY MIGHT BE DISTRIBUTING.

THE COURT: NO. THE DIFFERENCE WITH THAT IS POSSESSION WITH THE INTENT TO DISTRIBUTE AND POSSESSION. POSSESSION IS POSSESSION.

MR. SMITH: WELL, I UNDERSTAND, BUT FINDING POSSESSION ALWAYS CARRIES WITH IT A POSSIBILITY OF DISTRIBUTION, WHETHER

THEY CAN PROVE THAT OR NOT. AND I GUESS WHAT I'M SAYING IS MERE USAGE THROUGH A DRUG TEST, THAT HAS ALREADY BEEN INGESTED AND THERE'S NO POTENTIAL EVEN THAT THAT CAN HURT SOMEONE. AND SO I GUESS WHAT I'M SAYING IS THE COMMISSION FELT LIKE RATHER THAN ASSUMING THAT USAGE ALWAYS WAS AS EVIL AS POSSESSION, THAT THEY LEAVE IT TO THE COURT TO DETERMINE IN THE PARTICULAR CASE.

THE COURT: WELL, I THINK USAGE IS PRETTY BAD, FRANKLY.

MR. SMITH: I UNDERSTAND.

THE COURT: IF WE DIDN'T HAVE THE USAGE, WE WOULDN'T HAVE THE DEALING IN.

MR. SMITH: WELL, I UNDERSTAND, BUT IN TERMS OF THE --

THE COURT: SO, I DON'T HAVE ANY PROBLEM WITH DEALING WITH USERS, BECAUSE WHEN PEOPLE QUIT USING IT, THERE WON'T BE A MARKET FOR IT.

MR. SMITH: WELL, I UNDERSTAND THAT, BUT IN TERMS OF THE ONE-THIRD REVOCATION, HE'S CLEARLY GOING TO GET REVOKED HERE. I MEAN, THAT'S WHY WE'RE HERE.

THE COURT: THAT'S RIGHT.

MR. SMITH: BUT THE ISSUE IS WHETHER THE USAGE IS AS EVIL AS THE POSSESSION WHERE THERE SHOULD ALWAYS BE A MANDATORY ONE-THIRD REVOCATION, AND I SUBMIT THAT IT'S UP TO THE COURT IN THIS CASE, AND THE COMMISSION EXPRESSLY SAYS THAT DETERMINATION'S UP TO THE COURT. SO, I DON'T THINK IT'S DOING VIOLATION TO THE GUIDELINES FOR THE COURT TO FIND THAT WAY. IN THIS CASE WHERE YOU'VE GOT A GUY WHO HAS WORKED HARD ALL HIS LIFE AND HAS NEVER

BEEN TO PRISON, I DON'T THINK 20 MONTHS IS NECESSARY TO TEACH HIM HIS LESSON AT ALL. AND AS THE COURT NOTES, THE MAXIMUM HE WOULD HAVE GOTTEN WOULD HAVE BEEN SIX MONTHS.

THE COURT: WOULD HAVE BEEN SIX MONTHS UNDER THE GUIDELINES..

MR. SMITH: EXACTLY.

THE COURT: AND I DON'T HAVE A BIT OF PROBLEM WITH, YOU KNOW, IF YOU HAD AN OPPORTUNITY TO GET SIX MONTHS AND YOU DIDN'T, BUT YOU GO OUT THERE AND YOU DON'T KEEP YOUR NOSE CLEAN, THEN YOU CAN GET MORE THAN THAT. I DON'T HAVE A PROBLEM WITH THAT. BUT 10 TIMES MORE OR A MANDATORY FOUR TIMES MORE --

MR. SMITH: YES, YOUR HONOR.

THE COURT: -- IS A LITTLE HARSH. BUT THAT'S WHAT YOU GET INTO WHEN YOU START DEALING WITH STATISTICS AND MATHEMATICS INSTEAD OF HUMAN BEINGS.

WHAT IS THAT SECTION AGAIN? LET ME READ IT.

MS. KING: THE STATUTORY SECTION, YOUR HONOR --

THE COURT: YES.

MS. KING: -- OR THE GUIDELINE SECTION?

THE COURT: WELL, BOTH, I GUESS.

MS. KING: IT'S 3565 OF TITLE 18.

THE COURT: 35 --

MR. SMITH: 65(A).

MS. KING: (A), TITLE 18.

THE COURT: WELL, I THINK CONGRESS HAS SPOKEN. I DON'T

KNOW THAT I HAVE ANY CHOICE IN IT, MR. SMITH.

MR. SMITH: IF THE COURT WOULD LOOK AT APPLICATION NOTE 5.

THE COURT: OF THE GUIDELINES?

MR. SMITH: OF THE COMMENTARY.

THE COURT: OF THE GUIDELINES, YOU MEAN?

MR. SMITH: YES, YOUR HONOR.

THE COURT: I DON'T THINK THE GUIDELINES CAN AMEND THE STATUTORY PROVISION.

MR. SMITH: I AGREE WITH THAT, YOUR HONOR, BUT THE GUIDELINES SAY THAT THE DEFINITION OF POSSESSION IS AN OPEN QUESTION AS TO WHETHER POSSESSION ALWAYS EQUALS USE FOR PURPOSES OF THE MANDATORY ONE-THIRD. THEY EXPLICITLY SAY THAT -- AND I THINK IT IS AN ADMINISTRATIVE AGENCY INTERPRETING THE STATUTE -- THEIR INTERPRETATION SHOULD BE GIVEN SOME DEFERENCE BY THE COURT. IT CLAIMS THAT IT'S AN OPEN QUESTION WITH THE COURT AS TO WHETHER USE HAS TO CONSTITUTE POSSESSION.

THE COURT: IT IS, IT'S AN OPEN QUESTION, AND THIS COURT I THINK HAS ALREADY DECIDED IN OTHER CASES AND WILL DECIDE HERE THAT THERE'S NO WAY THAT YOU CAN INGEST IT WITHOUT POSSESSING IT.

MR. SMITH: WELL, YOUR HONOR, IF SOMEONE MIXED SOMETHING IN A DRINK AND YOU --

THE COURT: INVOLUNTARILY GAVE IT TO YOU. IN THAT INSTANCE I THINK THAT WOULD BE A LEGAL DEFENSE AND YOU SHOULDN'T

ADMIT, YOU KNOW, THE OFFENSE. I THINK THAT WOULD BE AN INVOLUNTARY POSSESSION OF IT, AND AS FAR AS I'M CONCERNED, IT WOULDN'T CONSTITUTE A CRIMINAL ACT, PERIOD. AND I WOULDN'T REVOKE THE PROBATION UNDER ANY CIRCUMSTANCES IF SOMEONE HAD DROPPED HIM A MICKEY, IF THAT'S WHAT YOU'RE SAYING.

MR. SMITH: WELL, IT'S AWFULLY DIFFICULT TO PROVE THAT, YOUR HONOR, AND I GUESS THOSE CONSIDERATIONS COME INTO PLAY AS WELL. THE COURT WOULD HAVE DIFFICULTY BELIEVING SOMEONE INVOLUNTARILY --

THE COURT: PROBABLY WOULD, BUT IF THAT'S WHAT HAPPENED -- BUT IN ABSENCE OF THAT HAPPENING, THERE HAS TO BE POSSESSION AS FAR AS I'M CONCERNED.

MR. SMITH: THE POLICY ARGUMENT THAT POSSESSION WOULD CARRY WITH IT OTHER POSSIBILITIES THAT USE WOULDN'T I GUESS IS NOT PERSUASIVE WITH THE COURT.

THE COURT: NOT TO ME. IF CONGRESS WANTED THAT, THEY SHOULD HAVE SAID IT. THEY'VE MADE DISTINCTIONS IN THEIR DRUG STATUTES BY DISTINGUISHING SIMPLE POSSESSION FROM POSSESSION WITH INTENT TO DISTRIBUTE, AND IF THEY WANTED TO DISTINGUISH IN THIS PARTICULAR STATUTE ANYTHING OTHER THAN POSSESSION, THEY SHOULD HAVE DONE SO. NOW, I DON'T LIKE WHAT THEY DID, BUT THERE ARE A LOT OF THINGS CONGRESS DOES I DON'T LIKE, A LOT OF THINGS.

MR. SMITH: YES, YOUR HONOR.

THE COURT: BUT I STILL ENDEAVOR IN MY OWN CONDUCT BOTH TO OBEY WHAT THEY DO AND IN MY PROFESSIONAL LIFE TO IMPLEMENT

WHAT THEY SAY, WHETHER I LIKE IT OR NOT.

MR. SMITH: WELL, THAT'S WHAT MAKES YOU A GOOD JUDGE, THAT YOU DON'T LEGISLATE, AND I UNDERSTAND THAT. I GUESS MY ONLY THOUGHT WAS THAT IF CONGRESS REALLY MEANT THIS AS CLEAR AS THE COURT FEELS, THEY COULD HAVE WRITTEN IN "DRUG USAGE." THEY DID NOT. THEY WROTE SIMPLY "POSSESSION," AND I THINK THAT FOR THAT REASON IT'S OPEN WITH THE COURT. IT WOULD HAVE BEEN VERY EASY FOR THEM TO DO THAT.

THE COURT: THAT'S RIGHT, BUT THEY DIDN'T, BECAUSE MY VIEW IS THAT DRUG USAGE IS CONSIDERED DRUG POSSESSION. THEY DIDN'T NEED TO. I MEAN, IF YOU USE IT, YOU HAVE TO POSSESS IT. THERE'S NO WAY YOU CAN USE IT WITHOUT POSSESSING IT. EVEN IF THAT POSSESSION IS JUST MOMENTARILY FOR THE MINUTE OR THE FEW SECONDS THAT IT TAKES TO TAKE IT FROM SOMEONE ELSE AND TO INGEST IT, WHETHER IT'S DONE BY WHATEVER THE VARIOUS MEANS ARE: WITH NEEDLE, INTRAVENOUSLY, ORALLY OR NASALLY, AND I GUESS THERE ARE OTHER WAYS. I DON'T KNOW. BUT I'VE HEARD TESTIMONY AS TO THOSE THREE WAYS.

MR. SMITH: YES, YOUR HONOR. I GUESS THE ONLY OTHER POINT I MIGHT MAKE IS THAT EVEN IF HE WERE TO BE CONVICTED OF A POSSESSION, SIMPLE POSSESSION, IT WOULD BE, AS THE COURT KNOWS, A MISDEMEANOR WITH A MAXIMUM OF A YEAR.

THE COURT: AND I HAVE DIFFICULTY UNDERSTANDING -- WELL, OF COURSE, HE'S NOT BEING SENTENCED FOR THE VIOLATION SUPPOSEDLY. HE'S BEING SENTENCED FOR THE ORIGINAL OFFENSE. AND

THIS IS HIGHLY INCONSISTENT. I HAVE DIFFICULTY WITH IT, MR. SMITH, AND YOU OBVIOUSLY KNOW I DO AND YOU'RE PERSISTING TO TRY TO CONVINCE THE COURT DIFFERENTLY.

I HAVE REAL DIFFICULTY WITH IT. I THINK IT'S JUST ANOTHER ONE OF THE INCONSISTENCIES IN THE SYSTEM, AND WHEN YOU START APPLYING A BUNCH OF NUMBERS IN A VERY DRASTIC METHOD, AS HAVE BEEN DONE -- CONGRESS IS THE ONE WHO SET THIS STATUTE, SO I SHOULDN'T REALLY BE CRITICIZING THE GUIDELINES NOW. THIS IS STRICTLY CONGRESSIONAL. BECAUSE WHAT YOU'RE TRYING TO ASK ME TO DO IS TO SHIFT TO THE GUIDELINES, BECAUSE IF WE SHIFTED TO THE GUIDELINES, WE'D DO IT MUCH EASIER AND I WOULD CERTAINLY NOT IMPOSE THE 20 MONTHS UNDER THE GUIDELINES. BUT UNDER THE STATUTE, I FEEL THAT I'M COMPELLED TO DO IT AS I'M COMPELLED IN MANY OTHER MANDATORY MINIMUM SENTENCES.

I IMPOSED LAST WEEK OR THE WEEK BEFORE -- LAST WEEK, I GUESS IT WAS, OR THE WEEK BEFORE -- SOME MANDATORY MINIMUM SENTENCES THAT WERE JUST -- THERE'S NO OTHER WAY TO DESCRIBE THEM OTHER THAN THEY'RE HARSH. WELL, EVEN BY MY STANDARDS LET ME SAY THEY'RE HARSH, AND MY STANDARDS ARE NOT KNOWN TO BE LENIENT.

MR. SMITH: SO, DO I GATHER THEN THE COURT --

THE COURT: I JUST DON'T FEEL I HAVE ANY CHOICE BUT TO REVOKE PROBATION AND IMPOSE 20 MONTHS --

MR. SMITH: ALL RIGHT.

THE COURT: -- UNDER THAT STATUTE, AND I FRANKLY DON'T LIKE IT.

MR. SMITH: I'M RELATIVELY NEW AT THIS JOB AND I DON'T KNOW -- IF THAT'S SETTLED, AND IT SOUNDS LIKE IT IS, I DON'T KNOW IF THIS IS THE APPROPRIATE WAY OF DOING IT, BUT THERE IS ONE ADDITIONAL MATTER I'D LIKE TO TAKE UP WITH THE COURT BEFORE THE COURT IMPOSES SENTENCE VERY BRIEFLY.

THE COURT: SURE. NO, YOU GO RIGHT AHEAD. YOU REPRESENT YOUR CLIENT.

MR. SMITH: YOUR HONOR, AT THE TIME THE ORIGINAL SENTENCE WAS IMPOSED MR. GRANDERSON WAS IN THE ZERO TO SIX MONTH RANGE. HE HAD A BASE LEVEL OF 6 UNDER THE GUIDELINES PRESENTED BY THE PROBATION OFFICER AND WE FILED AN OBJECTION AS TO WHETHER HIS UNDERLYING OFFENSE HAD BEEN PROPERLY PUT IN THE BASE LEVEL OF 6 OR WHETHER IT SHOULD HAVE BEEN MOVED TO A DIFFERENT GUIDELINE FOR -- I THINK IT WAS TAMPERING WITH MAIL, WHICH WAS ONLY A LEVEL 4. THE COURT ASKED WHETHER IT MADE A DIFFERENCE AND I INDICATED THAT SINCE IT WAS ZERO TO SIX I DIDN'T THINK IT DID.

IN RETROSPECT, YOUR HONOR, NOW THAT WE'RE AT REVOCATION TIME, I THINK IT DID MAKE A DIFFERENCE. HAD HE BEEN A BASE LEVEL 4 RATHER THAN A 6, THE COURT'S MAXIMUM SENTENCE WOULD HAVE BEEN THREE YEARS OF PROBATION RATHER THAN FIVE YEARS OF PROBATION, AND I GUESS I WOULD ASK THE COURT TO RECONSIDER ITS EARLIER RULING THAT HE BE PUT ON FIVE YEARS PROBATION AND PERHAPS CONSIDER THE POSSIBILITY OF REVISING THAT. IT WOULD BE AN ILLEGAL SENTENCE OF FIVE YEARS IF THE OTHER GUIDELINE HAD BEEN USED IN THIS CASE.

THE COURT: I HAVE DIFFICULTY WITH THAT, MR. SMITH,

BECAUSE I DON'T THINK I CAN MODIFY THE SENTENCE AT THIS TIME. AND IN SOME WAYS I'M GLAD TO BE RID OF OLD RULE 35, BUT I DON'T THINK IT'S FAIR. THE BIGGEST HEADACHE I EVER HAD WAS EVERYBODY ALWAYS WANTING ME TO MODIFY THE SENTENCES UP TO 120 DAYS. BUT, YOU KNOW, IF YOU'VE MADE A MISTAKE OR YOU'VE HAD A SECOND THOUGHT ABOUT SOMETHING, YOU CAN'T REDO IT NOW. I WOULD IN MY OWN CONSCIENCE RATHER TRY TO REASON MY WAY THROUGH THAT STATUTORY LANGUAGE INTO WHAT YOU WERE SUGGESTING RATHER THAN TRY TO DO WHAT YOU NOW SUGGEST. I CONSCIOUSLY COULD FIND IT EASIER PROBABLY --

MR. SMITH: YES, YOUR HONOR.

THE COURT: -- TO DO IT THE OTHER WAY.

MR. SMITH: I DON'T LIKE MENTIONING IT MYSELF, YOUR HONOR.

THE COURT: THAT'S ALL RIGHT.

MR. SMITH: FOR THE RECORD, YOUR HONOR, I WOULD NOTE THAT THERE ARE SOME -- I UNDERSTAND THIS COURT HAS NOT, BUT THERE ARE SOME JUDGES IN THIS DISTRICT THAT HAVE FOUND THAT USE DOES NOT NECESSARILY EQUATE WITH POSSESSION AND HAVE IMPOSED SENTENCES BENEATH THE ONE-THIRD MANDATORY MINIMUM.

THE COURT: THAT MAY BE, AND IF THERE'S SOME APPELLATE AUTHORITY THAT SAYS THAT, THEN THAT'S LAW FOR ME TO FOLLOW. BUT IN ABSENCE OF ELEVENTH CIRCUIT OR SUPREME COURT APPELLATE AUTHORITY TO THE CONTRARY, I MUST INTERPRET THE LAW, AND I THINK THE INTERPRETATION IS THE WAY I'VE SAID IT. IT'S NOT AN INTERPRETATION I LIKE.

MR. SMITH: YES, YOUR HONOR.

THE COURT: NOW, IF SOMEBODY ELSE EITHER SINCERELY BELIEVES THAT OR THEY FIND THAT AS AN EXPEDIENT WAY TO GET OUT FROM DOING SOMETHING THEY DON'T WANT TO DO -- AND I'M NOT GOING TO DO THAT BECAUSE I THINK MY OATH SAYS I SHOULDN'T. IF YOU START CHANGING THE LAW TO SUIT ONE SITUATION, THEN YOU'LL DO IT FOR ANOTHER, AND I'LL DO MY JOB AND CONGRESS WILL DO THEIRS. CONGRESS DID THEIRS AND I'M TRYING TO DO MINE UNDER IT. AND I DON'T LIKE WHAT THEY DID. IF THEY DON'T LIKE IT, THEN THEY SHOULD COME BACK AND CHANGE THE LAW SO THAT I CAN FIT WITHIN IT. AND I'M VERY SYMPATHETIC WITH YOUR ARGUMENT. YOU DON'T HAVE TO APOLOGIZE FOR TRYING TO MAKE THEM. YOU REPRESENT YOUR CLIENT; THAT'S WHAT I WANT YOU TO DO. THAT'S WHAT I WOULD DO, WHAT I DID WHEN I WAS THERE. EVEN THOUGH I REJECT YOUR ARGUMENTS, THERE'S NOTHING WRONG WITH YOUR TRYING TO MAKE THEM.

ALL RIGHT. IN CASE NUMBER 91-1, ON THE ADMISSION OF THE VIOLATION OF CONDITIONS OF PROBATION, THE COURT FINDS THE DEFENDANT'S VIOLATED THE CONDITIONS OF PROBATION IN THIS CASE, AND PURSUANT TO SECTION 3565 -- IS IT (A)? I BELIEVE IT IS.

MS. KING: YES, SIR.

MR. SMITH: YES, YOUR HONOR.

THE COURT: OF TITLE 18 OF THE UNITED STATES CODE, REVOKES THE PROBATION AND SENTENCES THE DEFENDANT, RALPH STUART GRANDERSON, JR., TO 20 MONTHS CUSTODY OF THE BUREAU OF PRISONS, AND IN ADDITION THERETO, TO THREE YEARS OF SUPERVISED RELEASE TO

FOLLOW. ALL RIGHT, ANYTHING FURTHER?

MS. KING: YOUR HONOR, WE HAVEN'T DISCUSSED WHETHER OR NOT THE COURT IS GOING TO ALLOW THE DEFENDANT TO SURRENDER OR REMAND HIM TO CUSTODY.

THE COURT: HE'S FREE NOW, RIGHT?

MS. KING: THAT'S CORRECT, SIR.

MR. SMITH: HE WASN'T EVEN ON BOND. WELL, HE MAY BE ON BOND. HE APPEARED TODAY, YOUR HONOR.

THE COURT: WHAT'S YOUR REQUEST?

MR. SMITH: WE WOULD REQUEST VOLUNTARY SURRENDER.

THE COURT: I'LL DEFER EXECUTION. DO YOU HAVE ANY OBJECTION TO IT?

MS. KING: NO, YOUR HONOR.

THE COURT: I SEE NO PROBLEM WITH THAT. I'LL DEFER THE EXECUTION OF THAT SENTENCE AND DIRECT THAT THE IMPRISONMENT PORTION OF THE SENTENCE BE DEFERRED UNTIL -- JUDY, I DON'T HAVE A CALENDAR. IF YOU'LL GIVE ME A DATE OR SOMETHING.

HOW MUCH TIME DO YOU WANT OR NEED? YOU'D LIKE 20 MONTHS, WOULDN'T YOU?

MR. SMITH: WE'D LIKE AN APPEAL BOND, YOUR HONOR, IF THAT'S POSSIBLE.

THE COURT: WELL, I DON'T OBJECT TO YOUR APPEALING THIS, CERTAINLY. FRANKLY, I WOULD OTHERWISE SENTENCE HIM TO SOMETHING IN A YEAR RANGE. I THINK YOU COULD PROBABLY GET AN APPEAL DECIDED BEFORE THAT WOULD BE UP ANYWAY. I WOULD HOPE YOU

WOULD APPEAL IT AND WIN. I DON'T OFTEN LIKE TO BE REVERSED, BUT IF YOU DID, IT WOULD BE A CASE THAT WOULDN'T BOTHER ME ON THE INTERPRETATION OF THE LAW ISSUE.

MR. SMITH: YES, YOUR HONOR.

THE COURT: THE FACTS IS SOMETHING DIFFERENT, BECAUSE I FIND WITHIN THE MEANING OF THE STATUTE THAT HE POSSESSED COCAINE, I BELIEVE IT WAS.

MS. KING: YES, YOUR HONOR.

MR. SMITH: YES, YOUR HONOR.

THE COURT: I BELIEVE IT WAS COCAINE. ALL RIGHT, I WILL DEFER THE EXECUTION. THAT'S WHAT WE WERE LOOKING AT. I'D SAY OCTOBER -- I MEAN AUGUST THE 26TH. THAT'S A MONTH.

MR. SMITH: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT, ANYTHING FURTHER?

MR. SMITH: NO. THANK YOU, YOUR HONOR.

MS. KING: NO, YOUR HONOR.

THE COURT: ALL RIGHT, WE'LL RECESS TILL FURTHER ORDER.

* * *

(HEARING CONCLUDED)

* * *

FEDERAL DEFENDER PROGRAM, INC.
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
SUITE 3512, 101 MARIETTA TOWER
ATLANTA, GEORGIA 30303

STEPHANIE KEARNS
EXECUTIVE DIRECTOR

TELEPHONE
404 688-7530
FAX
404 688-0768

May 19, 1993

Mr. William K. Suter
Clerk
United States Supreme Court
Washington, DC 20543

Re: United States v. Ralph Stuart Granderson
92-1662

Dear Mr. Suter:

Enclosed herewith is the original Brief in Opposition to the United States of America's Petition for a Writ of Certiorari plus twelve copies in the above-styled case. Also included are the Respondent's Motion to Proceed in Forma Pauperis and Proof of Service.

Please accept these documents for filing.

Very truly yours,

Gregory S. Smith
Attorney for Respondent

GSS:SW

Enclosures

FEDERAL DEFENDER PROGRAM, INC.
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
SUITE 3512, 101 MARIETTA TOWER
ATLANTA, GEORGIA 30303

STEPHANIE KEARNS
EXECUTIVE DIRECTOR

TELEPHONE
404 688-7530
FAX
404 688-0768

May 19, 1993

William C. Bryson
Acting Solicitor General
Department of Justice
Washington, DC 20530

Re: United States v. Ralph Stuart Granderson
No. 92-1662

Dear Acting Solicitor General:

Enclosed please find a copy of the Brief in Opposition to the United States of America's Petition for a Writ of Certiorari which I have filed on behalf of Mr. Granderson.

Very truly yours,

Gregory S. Smith
Attorney for Respondent

GSS:SW

Enclosure

No. 92-1662

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH STUART GRANDERSON, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

GREGORY S. SMITH
Federal Defender Program, Inc.
Suite 3512, 101 Marietta Tower
Atlanta, Georgia 30303
(404) 688-7530

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

PETITION FOR WRIT OF CERTIORARI FILED: APRIL 15, 1993
CERTIORARI GRANTED: JUNE 28, 1993

38 pp

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA

Case No. 1:91-CR-01

UNITED STATES OF AMERICA

v.

RALPH STUART GRANDERSON, JR.

**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

DATE		PROCEEDINGS
1/3/91	1	INFORMATION filed. Ralph Stuart Granderson (1) counts 1 (paw) [Entry date 01/04/91]
	• • • •	
1/11/91	4	Arraignment held before Judge William C. O'Kelley as to Ralph Stuart Granderson, Jr. PLEA OF GUILTY by Ralph Stuart Granderson (1) count(s) 1. Case assigned to Judge William C. O'Kelley . . (pt) [Entry date 01/15/91]
	• • • •	
3/18/91	—	Sentencing of Relph Stuart Granderson (1) count(s) 1. CNT 1: 5 yrs. supv'd release under direction of USPO w/standard & spec. conditions of prob.—Fine $2,000—Spec. assessment $50.00, (pt) [Entry date 03/20/91]
	• • • •	

DATE		PROCEEDINGS
7/29/91	—	PROBATION REVOCATION HEARING HELD before Judge William C. O'Kelley. Defendant ADMITTED ALLEGATIONS as set forth in the petition. Court finds defendant has violated conditions of probation. REVOKING PROBATION Ralph Stuart Granderson (1) count(s) 1 (yrm) [Entry date 08/02/91]
		* * * *
8/2/91	12	Sentencing of Ralph Stuart Granderson (1) count(s) 1. CNT 1: 5 yrs. supv'd release under direction of USPO w/standard & spec. conditions of prob.—Fine $2,000—Spec. assessment $50.00—ORD. PROBATION REVOKED 8/2/91—CBOP 20 MOS.—3 YRS SUPV'D REL (imposition of sentence deferred until 8/26/91). (pt) [Entry date 08/05/91]
		* * * *
8/9/91	13	NOTICE OF APPEAL from modify sentence [12-1] for on or about August 3, 1991 by defendant Ralph Stuart Granderson Jr. (pt) [Entry date 08/12/91] [Edit date 08/12/91]
		* * * *

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 91-8728

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

RALPH STUART GRANDERSON, JR.,
DEFENDANT-APPELLANT

DATE	PROCEEDINGS
8/13/91	Dup. Notice of Appeal and D.C. Docket Entries & Order
	* * * *
6/29/92	Case Argued * * *
8/4/92	Opinion Rendered
	* * * *
11/30/92	Order Denying Rehearing
	* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 1:91-CR-101

UNITED STATES OF AMERICA

v.

RALPH STUART GRANDERSON, JR.

CRIMINAL INFORMATION

THE UNITED STATES ATTORNEY
CHARGES THAT:

From on or about June 2, 1990, and continuing up to and including June 20, 1990, in the Northern District of Georgia, the defendant RALPH STUART GRANDERSON, JR., being employed as a Postal Service Carrier, did unlawfully secret, destroy, detain, delay, and open mail which had been entrusted to him and had come into his possession, that is, eight (8) pieces of First Class Mail, identified as follows:

Addressed To:	Return Address:
1. Debra Lynch 1728 Wayland Circle Atlanta, Georgia 30319	Bernice B. Lynch 308 S.W. 3rd P.O. Box 391 Gilmore City, Iowa 50541
2. Ms. Jackie Morris 2697 N. Thompson Road Atlanta, Georgia 30319	Uncle Roy 203 Fern Vale Cincinnati, Ohio
3. David & Karen McConnell 3858 Ashford Road Atlanta, Georgia 30319	Unknown
4. Mrs. Teresa Campbell 2854 Redding Road Atlanta, Georgia 30319	609 Carolyn Court Birmingham, Alabama 35012

5. Ms. Jackie Morris 2697 N. Thompson Road Atlanta, Georgia 30319	Noelle Mann 7071 Georgetown Street, N.E. East Canton, Ohio 44730
6. Debra Lynch 1728 Wayland Circle Atlanta, Georgia 30319	Nancy Lyon 602 Friendship Lane Jamaica, New York 11402
7. Karen McConnell 3858 Ashford Road Atlanta, Georgia 30319	3801 West Palm Drive Miami, Florida 33156
8. David McConnell 3858 Ashford Ridge, N.E. Atlanta, Georgia 30319	B. Lane 16 Greevesway Pittsburgh, Pennsylvania

which were intended to be conveyed by mail, all in violation of Title 18, United States Code, Section 1703(a).

/s/ Joe D. Whitley
JOE D. WHITLEY
United States Attorney

/s/ Janet F. King
JANET F. KING
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Docket No. 1:91-CR-01

(Title Omitted in Printing)

PETITION ON PROBATION AND SUPERVISED RELEASE

COMES NOW James G. Heflin, Jr. PROBATION OFFICER OF THE COURT presenting an official report upon the conduct and attitude of probationer Ralph Granderson who was placed on probation by the Honorable William C. O'Kelley sitting in the court at Atlanta, on the 18th day of March, 1991, who fixed the period of probation supervision at five years, and imposed the general terms and conditions of probation theretofore adopted by the court and also imposed special conditions and terms as follows:

The defendant is prohibited from possessing a firearm or other dangerous weapon.

The defendant shall participate, if any time being necessary and required to do so, in any program approved by the U.S. Probation Office for substance abuse, which may include testing to determine whether the defendant has reverted to the use of alcohol or drugs.

RESPECTFULLY PRESENTING PETITION FOR ACTION OF COURT FOR CAUSE AS FOLLOWS:

Probationer has possessed/used drugs in that on 5-10-91 and 6-7-91, probationer rendered urine samples which tested positive for cocaine metabolite.

PRAYING THAT THE COURT WILL ORDER Ralph Granderson to appear in Court in Atlanta, Georgia, in Courtroom 1906, 75 Spring Street, S.W., on July 29, 1991, at 10:30 A.M., to show cause why his probation should not be revoked.

ORDER OF COURT

Considered and ordered this 19th day of July 1991 and made a part of the records in the above case.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge

Respectfully,

/s/ James G. Heflin, Jr.
JAMES G. HEFLIN, JR.
United States Probation Officer
Atlanta, Georgia

Date: June 28, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(Title Omitted in Printing)

TRANSCRIPT OF REVOCATION OF PROBATION

Before the Honorable WILLIAM C. O'KELLEY, Chief United States District Judge, on Monday, July 29, 1991, in Courtroom 1906, nineteenth floor, United States Courthouse, in Atlanta, Fulton County, Georgia, in the above-styled action.

APPEARANCES OF COUNSEL:

For the United States: Janet King

For the Defendant: Gregory Smith

[2] (In Atlanta, Fulton County, Georgia; Monday, July 29, 1991; 10:30 A.M.; in open court.)

THE COURT: Is Granderson in custody?

MR. SMITH: No. He's out here.

THE COURT: All right.

THE CLERK: Call the case United States of America versus Ralph Granderson, Criminal Number 1:91-01. Is the government ready?

MS. KING: The government's ready, Your Honor.

THE COURT: Mr. Smith, are you ready? You've got this one also?

MR. SMITH: Yes, Your Honor.

THE COURT: All right. All right, have you received a copy of the government's application for probation revocation in this case?

MR. SMITH: Yes, Your Honor.

THE COURT: How do you respond to it?

MR. SMITH: Your Honor, we admit the charge.

THE COURT: You admit the charges?

MR. SMITH: Yes, Your Honor.

THE COURT: All right. Mr. Granderson, is there any reason that the court should not revoke the probation in this case?

Or is there any reason you wish to state, Mr. Smith?

MR. SMITH: I'm sorry. Just one minute.

[3] Your Honor, I think that the points we would want to make are these. As Your Honor may know, we believe the court has discretion to impose a sentence in this case. As I understand it—I guess maybe I should start with asking what the government intends to seek in this case.

MS. KING: Your Honor, the government's position is that as pled by the petition for revocation, that the defendant has possessed or the probationer has possessed and used drugs. If the court makes that findings, there is a mandatory revocation under 3565 subsection (A), that the court would have to revoke and impose at least one-

third of the five-year original sentence. Therefore, that would be the court's position—the government's position, excuse me—that the court under these facts must revoke under the statute and impose not less than 20 months.

MR. SMITH: Your Honor, perhaps I should clarify the admission then. Mr. Granderson admits use of drugs but does not admit possession in the terms that the government has indicated, and I believe that in circumstances where the use is indicated from the drug testing, which it was here, the court has the discretion not to impose the mandatory one-third, and that's what we would ask the Court to do here.

If the court may recall, Mr. Granderson has no prior criminal history at all except for the underlying offense, which did not relate to drugs at all. It was mail theft. During the [4] pretrial services' report Mr. Granderson was out on bond for a substantial period of time, had no problems whatsoever, was drug tested periodically during that time, never tested positive at all. No indication he's ever had any drug problems. This related to a mistake he made in terms of getting I guess in a sort of party setting and doing something he shouldn't have, but we submit that 20 months would be unduly harsh, given his background and the circumstances, and we would ask the Court that the Court impose a sentence below the 20 months requested by the government.

In the case of United States versus Smith, which is an eleventh circuit case from last year, 907 F. 2d 133, the court talks about ways to do revocation under the guidelines. This was before the new guideline had been implemented which said where within the range the court ought to impose sentence, and the Smith case said that the court should go back to the original sentencing range, which in this case would be zero to six months, and impose a sentence within that range. I think that the Smith case may not be applicable now that the guidelines have

indicated specific revocation guidelines as well, but nevertheless at least under Smith the court at that time perhaps could have been limited to the zero to six month range.

Because he's a criminal history category 1, I would also note to the court that but for the mandatory revocation, assuming that this would be a grade (C) violation a technical [5] violation—at least in terms of parole revocation, drug use is a technical violation—his range would be three to nine months. So, again, Your Honor, we're talking about ranges well below the 20 months that the government's seeking in this case.

We submit that the court, given Mr. Granderson's good background—he's been a hard-working fellow for a long time and he's never been in trouble before in his life until this underlying offense and violation. He's not particularly a young man either, se he's led a good life for a substantial period of time. We ask the court to exercise its discretion, to find that the use was demonstrated by Mr. Granderson's drug testing only and exercise its discretion to go below the 20 months and impose a sentence that might be more appropriate in this case. He's never been to prison, and we submit that 20 months is a substantial period of time for a drug test.

MS. KING: Your Honor, the government's position is that there's no way that Mr. Granderson used the drugs unless he possessed them and that it would be appropriate for the court to find that he was in possession of the drug, in violation of the guidelines and in violation of the statute, and should therefore apply the mandatory revocation.

For the record, I'd like the Court to note that the government's position is that according to our review of the Smith decision and discussions with the department of justice, would be that the court would have to abide by United States [6] versus Smith if you do not find a mandatory revocation and therefore the sentence would have to be imposed within the original guideline

range of zero to six months. If the court felt that that was not appropriate, I did want to let the court know that I spoke with Mr. Heflin, and the probation office's figures that they provided to you under chapter 7 of 12 to 18 months of revocation are incorrect. They had figured that the possession or the usage of the cocaine would be a felony. Of course, as the court's aware, that's only a misdemeanor. So, the chapter 1 guidelines are three to nine months, as Mr. Smith noted.

Therefore, the three possibilities in this case are that the court would find that the use of the drugs as admitted by the defendant constituted possession and revoke for the 20 months or apply Smith. That would be—the zero to six months would be the range, unless the court felt that Smith was not binding on you, and you would apply Chapter 7, which would be three to nine months.

THE COURT: Just a minute. Let me review something.

MS. KING: All right, sir.

THE COURT: I'm not sure that I agree with the interpretation of the mandatory revocation and sentence to at least one-third of the original sentence. I don't quarrel with that principle of law. The question is: What was the original sentence? In this case there was no original sentence to jail. Has that been interpreted to be the minimum sentence—

MS. KING: No, Your Honor.

THE COURT: —authorized by statute, which was five years?

MS. KING: Your Honor, if the Court—let me see if I can find it. There is no longer the guidelines where the Court suspends imposition of sentence.

THE COURT: I realize that. That was the old way of doing it.

MS. KING: Right. Five years was the sentence. The Court allowed it to be served on probation. It is the government's position that the original probation period

of five years was the original sentence, and I'll refer the Court to Section 3561 of Title 18 that indicates that a period of probation constitutes a sentence. Guideline Section 7A2(a), little (a) (provides that a period of probation under the guidelines is a sentence. Therefore, in interpreting 3565, the government's position would be that the probated sentence that the court gave is the original sentence that is referred to in the revocation language, a period of probation. It's very hard and I had difficulty conceptualizing probation as the sentence, but that is the interpretation.

THE COURT: Well, that's been the concept in the state court system in the past, so I don't have much trouble understanding it. I don't like the analysis, but I don't have [8] any problem understanding that's what they're saying. That's the way I think the state court sentences have operated for years; that whatever the probationary term was, that was the sentence, I believe. That again is where we've gotten away from the traditional old federal system, which I thought was a fairer, more progressive system, because frankly had I been going to sentence him to jail, I wouldn't have sentenced him to five years. So, I give him a break and sentence him to five years probation, and now when he violates it he's subjected to four times what he would have been—well, more than that really. 10 times. He's subjected up to five years, 60 months; whereas, otherwise he would have been subjected only to six months, so it's 10 times as much. There's just something wrong with that, but there's a lot wrong with the guidelines. I will retire from this court before anybody ever convinces me that they're fair.

MR. SMITH: Well, in this case, Your Honor, I think the guidelines give the court an out. In application note 5 to 7B1.4, after citing the statutory provisions about the mandatory one-third, it states as follows: the Commission leaves to the court the determination of whether evidence

of drug usage established solely by laboratory analysis constitutes, quote, possession of a controlled substance, end quote, as set forth in the statutes. And, Your Honor, while it may—

THE COURT: I have difficulty with that and that's the same way the Commission—you know, they compromise their [9] principles. I've heard those Commissioners say, "Oh, you're not bound by these guidelines. You can depart whenever you want to." Well, that's not what they say and that's not what the law says and I've not done that. They've written them one way and then they tell us something different and I don't agree with them. Even though I don't like the guidelines, I intend to apply them as I understand them as best I can. Now, what you're saying here is they have said this is the guideline, but if you're willing to compromise your findings—and that's in effect what you're doing in my judgment. If you've taken drugs and you have it in your system, then you've possessed those drugs. They're saying, "Well, you can find differently." Well, I have difficulty with that.

MR. SMITH: I understand the Court's feeling. I guess my thought is as to why the Commission did that is this: it's a policy determination. I think finding someone in possession is actually viewed as worse than actually having them and used it; and what was it that Congress meant when they said possession of a controlled substance? If you find somebody in possession, well, they might be distributing.

THE COURT: No. The difference with that is possession with the intent to distribute and possession. Possession is possession.

MR. SMITH: Well, I undertand, but finding possession always carries with it a possibility of distribution, whether [10] they can prove that or not. And I guess what I'm saying is mere usage through a drug test, that has already been ingested and there's no potential even

that that can hurt someone. And so I guess what I'm saying is the Commission felt like rather than assuming that usage always was as evil as possession, that they leave it to the Court to determine in the particular case.

THE COURT: Well, I think usage is pretty bad, frankly.

MR. SMITH: I understand.

THE COURT: If we didn't have the usage, we wouldn't have the dealing in.

MR. SMITH: Well, I understand, but in terms of the——

THE COURT: So, I don't have any problem with dealing with users, because when people quit using it, there won't be a market for it.

MR. SMITH: Well, I understand that, but in terms of the one-third revocation, he's clearly going to get revoked here. I mean, that's why we're here.

THE COURT: That's right.

MR. SMITH: But the issue is whether the usage is as evil as the possession where there should always be a mandatory one-third revocation, and I submit that it's up to the Court in this case, and the Commission expressly says that determination's up to the Court. So, I don't think it's doing violation to the guidelines for the Court to find that way. In this case where you've got a guy who has worked hard all his life and has never [11] been to prison, I don't think 20 months is necessary to teach him his lesson at all. And as the Court notes, the maximum he would have gotten would have been six months.

THE COURT: Would have been six months under the guidelines.

MR. SMITH: Exactly.

THE COURT: And I don't have a bit of problem with, you know, if you had an opportunity to get six months and you didn't, but you go out there and you don't keep your nose clean, then you can get more than that. I don't have a problem with that. But 10 times more or a mandatory four times more—

MR. SMITH: Yes, Your Honor.

THE COURT: —is a little harsh. But that's what you get into when you start dealing with statistics and mathematics instead of human beings.

What is that section again? Let me read it.

MS. KING: The statutory section, Your Honor—

THE COURT: Yes.

MS. KING: —or the guideline section?

THE COURT: Well, both, I guess.

MS. KING: It's 3565 of Title 18.

THE COURT: 35—

MR. SMITH: 65(A).

MS. KING: (A), Title 18.

THE COURT: Well, I think Congress has spoken. I don't [12] know that I have any choice in it, Mr. Smith.

MR. SMITH: If the Court would look at application note 5.

THE COURT: Of the guidelines?

MR. SMITH: Of the commentary.

THE COURT: Of the guidelines, you mean?

MR. SMITH: Yes, Your Honor.

THE COURT: I don't think the guidelines can amend the statutory provision.

MR. SMITH: I agree with that, Your Honor, but the guidelines say that the definition of possession is an open question as to whether possession always equals use for purpose of the mandatory one-third. They explicitly say that—and I think it is an administrative agency interpreting the statute—their interpretation should be given some deference by the Court. It claims that it's an open question with the Court as to whether use has to constitute possession.

THE COURT: It is, it's an open question, and this Court I think has already decided in other cases and will decide here that there's no way that you can ingest it without possessing it.

MR. SMITH: Well, Your Honor, if someone mixed something in a drink and you—

THE COURT: Involuntarily gave it to you. In that instance I think that would be a legal defense and you shouldn't [13] admit, you know, the offense. I think that would be an involuntary possession of it, and as far as I'm concerned, it wouldn't constitute a criminal act, period. And I wouldn't revoke the probation under any circumstances if someone had dropped him a mickey, if that's what you're saying.

MR. SMITH: Well, it's awfully difficult to prove that, Your Honor, and I guess those considerations come into play as well. The Court would have difficulty believing someone involuntarily—

THE COURT: Probably would, but if that's what happened—but in absence of that happening, there has to be possession as far as I'm concerned.

MR. SMITH: The policy argument that possession would carry with it other possibilities that use wouldn't I guess is not persuasive with the Court.

THE COURT: Not to me. If Congress wanted that, they should have said it. They've made distinctions in their drug statutes by distinguishing simple possession from possession with intent to distribute, and if they wanted to distinguish in this particular statute anything other than possession, they should have done so. Now, I don't like what they did, but there are a lot of things Congress does I don't like, a lot of things.

MR. SMITH: Yes, Your Honor.

THE COURT: But I still endeavor in my own conduct both to obey what they do and in my professional life to implement [14] what they say, whether I like it or not.

MR. SMITH: Well, that's what makes you a good judge, that you don't legislate, and I understand that. I guess my only thought was that if Congress really meant this as clear as the Court feels, they could have written in "drug usage." They did not. They wrote simply "possession," and I think that for that reason it's

open with the Court. It would have been very easy for them to do that.

THE COURT: That's right, but they didn't, because my view is that drug usage is considered drug possession. They didn't need to. I mean, if you use it, you have to possess it. There's no way you can use it without possessing it. Even if that possession is just momentarily for the minute or the few seconds that it takes to take it from someone else and to ingest it, whether it's done by whatever the various means are: with needle, intravenously, orally or nasally, and I guess there are other ways. I don't know. But I've heard testimony as to those three ways.

MR. SMITH: Yes, Your Honor. I guess the only other point I might make is that even if he were to be convicted of a possession, simple possession, it would be, as the Court knows, a misdemeanor with a maximum of a year.

THE COURT: And I have difficulty understanding—well, of course, he's not being sentenced for a violation supposedly. He's being sentenced for the original offense. And [15] this is highly inconsistent. I have difficulty with it, Mr. Smith, and you obviously know I do and you're persisting to try to convince the Court differently.

I have real difficulty with it. I think it's just another one of the inconsistencies in the system, and when you start applying a bunch of numbers in a very drastic method, as have been done—Congress is the one who set this statute, so I shouldn't really be criticizing the guidelines now. This is strictly congressional. Because what you're trying to ask me to do is to shift to the guidelines, because if we shifted to the guidelines, we'd do it much easier and I would certainly not impose the 20 months under the guidelines. But under the statute, I feel that I'm compelled to do it as I'm compelled in many other mandatory minimum sentences.

I imposed last week or the week before—last week, I guess it was, or the week before—some mandatory minimum sentences that were just—there's no other way to describe them other than they're harsh. Well, even by my standards let me say they're harsh, and my standards are not known to be lenient.

MR. SMITH: So, do I gather then the Court—

THE COURT: I just don't feel I have any choice but to revoke probation and impose 20 months—

MR. SMITH: All right.

THE COURT: —under the statute, and I frankly don't like it.

[16] MR. SMITH: I'm relatively new at this job and I don't know—if that's settled, and it sounds like it is, I don't know if this is the appropriate way of doing it, but there is one additional matter I'd like to take up with the Court before the Court imposes sentence very briefly.

THE COURT: Sure. No, you go right ahead. You represent your client.

MR. SMITH: Your Honor, at the time the original sentence was imposed Mr. Granderson was in the zero to six month range. He had a base level of 6 under the guidelines presented by the probation officer and we filed an objection as to whether his underlying offense had been properly put in the base level of 6 or whether it should have been moved to a different guideline for—I think it was tampering with mail, which was only a level 4. The Court asked whether it made a difference and I indicated that since it was zero to six I didn't think it did.

In retrospect, Your Honor, now that we're at revocation time, I think it did make a difference. Had he been a base level 4 rather than a 6, the Court's maximum sentence would have been three years of probation rather than five years of probation, and I guess I would ask the Court to reconsider its earlier ruling that he be put on five years probation and perhaps consider the possibility of revising that. It would be an illegal sentence of five years if the other guideline had been used in this case.

THE COURT: I have difficulty with that, Mr. Smith,

[17] because I don't think I can modify the sentence at this time. And in some ways I'm glad to be rid of old Rule 35, but I don't think it's fair. The biggest headache I ever had was everybody always wanting me to modify the sentences up to 120 days. But, you know, if you've made a mistake or you've had a second thought about something, you can't redo it now. I would in my own conscience rather try to reason my way through that statutory language into what you were suggesting rather than try to do what you now suggest. I consciously could find it easier probably—

MR. SMITH: Yes, Your Honor.

THE COURT: —to do it the other way.

MR. SMITH: I don't like mentioning it myself, Your Honor.

THE COURT: That's all right.

MR. SMITH: For the record, Your Honor, I would note that there are some—I understand this Court has not, but there are some judges in this district that have found that use does not necessarily equate with possession and have imposed sentences beneath the one-third mandatory minimum.

THE COURT: That may be, and if there's some appellate authority that says that, then that's law for me to follow. But in absence of Eleventh Circuit or Supreme Court appellate authority to the contrary, I must interpret the law, and I think the interpretation is the way I've said it. It's not an interpretation I like.

[18] MR. SMITH: Yes, Your Honor.

THE COURT: Now, if somebody else either sincerely believes that or they find that as an expedient way to get out from doing something they don't want to do—and I'm not going to do that because I think my oath says I shouldn't. If you start changing the law to suit one situation, then you'll do it for another, and I'll do my job and Congress will do theirs. Congress did theirs and I'm trying to do mine under it. And I don't like what they

did. If they don't like it, then they should come back and change the law so that I can fit within it. And I'm very sympathetic with your argument. You don't have to apologize for trying to make them. You represent your client; that's what I want you to do. That's what I would do, what I did when I was there. Even though I reject your arguments, there's nothing wrong with your trying to make them.

All right. In case number 91-1, on the admission of the violation of conditions of probation, the Court finds the defendant's violated the conditions of probation in this case, and pursuant to section 3565—is it (A)? I believe it is.

MS. KING: Yes, sir.

MR. SMITH: Yes, Your Honor.

THE COURT: Of Title 18 of the United States Code, revokes the probation and sentences the defendant, Ralph Stuart Granderson, Jr., to 20 months custody of the Bureau of Prisons, and in addition thereto, to three years of supervised release to [19] follow. All right, anything further?

MS. KING: Your Honor, we haven't discussed whether or not the Court is going to allow the defendant to surrender or remand him to custody.

THE COURT: He's free now, right?

MS. KING: That's correct, sir.

MR. SMITH: He wasn't even on bond. Well, he may be on bond. He appeared today, Your Honor.

THE COURT: What's your request?

MR. SMITH: We would request voluntary surrender.

THE COURT: I'll defer execution. Do you have any objection to it?

MS. KING: No, Your Honor.

THE COURT: I see no problem with that. I'll defer the execution of that sentence and direct that the imprisonment portion of the sentence be deferred until—Judy, I don't have a calendar. If you'll give me a date or something.

How much time do you want or need? You'd like 20 months, wouldn't you?

MR. SMITH: We'd like an appeal bond, Your Honor, if that's possible.

THE COURT: Well, I don't object to your appealing this, certainly. Frankly, I would otherwise sentence him to something in a year range. I think you could probably get an appeal decided before that would be up anyway. I would hope you [20] would appeal it and win. I don't often like to be reversed, but if you did it, it would be a case that wouldn't bother me on the interpretation of the law issue.

MR. SMITH: Yes, Your Honor.

THE COURT: The facts is something different, because I find within the meaning of the statute that he possessed cocaine, I believe it was.

MS. KING: Yes, Your Honor.

MR. SMITH: Yes, Your Honor.

THE COURT: I believe it was cocaine. All right, I will defer the execution. That's what we were looking at. I'd say October—I mean August the 26th. That's a month.

MR. SMITH: Thank you, Your Honor.

THE COURT: All right, anything further?

MR. SMITH: No. Thank you, Your Honor.

MS. KING: No, Your Honor.

THE COURT: All right, we'll recess till further order.

* * * * *

(Hearing concluded)

* * * * *

(Certificate Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(Title Omitted in Printing)

TRANSCRIPT OF RESENTENCING

Before THE HONORABLE WILLIAM C. O'KELLEY, Chief United States District Judge, on Friday, April 23, 1993, in Courtroom 1906, nineteenth floor, United States Courthouse, in Atlanta, Fulton County, Georgia, in the above-styled action.

APPEARANCES OF COUNSEL:

For the United States: JANET KING

For the Defendant: GREGORY SMITH

[2] (In Atlanta, Fulton County, Georgia; Friday, April 23, 1993; in Open Court.)

THE CLERK: Call the case of the United States versus Granderson, Criminal Number 91-01. The government ready?

MS. KING: Ready, Your Honor.

THE CLERK: The defendant ready?

MR. SMITH: Yes, Your Honor.

THE COURT: Okay. Is there anything further? I believe this case is back for resentencing. And you've filed motions and briefs on your position I believe, Mr. Smith.

MR. SMITH: Yes, Your Honor.

THE COURT: Anything further you wish to say?

MR. SMITH: Your Honor, if I might just briefly review our position. If the Court doesn't feel it's necessary, I won't, but obviously when the Court imposed 20 months, supervised release was mandatory. When the Eleventh Circuit found that the maximum was six months, under the guidelines it became discretionary. And, Judge, the reason that we're asking that Mr. Granderson be removed from supervised release is—there are three reasons. First, the court of appeals didn't suggest that it would be necessary. It said that if supervised release is imposed on remand, that it's discretionary with the Court.

And, Judge, I would note Mr. Granderson has served more than the six months that the court of appeals found was the maximum. He served about 11 months before the ruling came down. [3] So, he has served five extra months that he has not gotten credit for and will not as long as he stays on the straight and narrow, as he has up until now. Because of that, because of the fact that he's served five months of unnecessary incarceration—at least at this stage it's unnecessary—we submit that that's plenty of punishment here and serves the purposes of the overall statute, overall punitive effects of the statute. That is our main reason. It's just out of equity,

Judge. It seems like to impose additional supervised release would be unnecessary.

Second, Judge—and this is real important, too. The Court of Appeals made it clear that his supervised release term doesn't start from the end of that six-month period but starts at the end of when he was let out. So, it's important for the Court to understand that rather than ending in February, which would have been when his six months ended, it doesn't start until August.

Third, and most importantly, Judge, is that Mr. Granderson has done a good job on supervised release. I believe the Court has a copy of a letter from Mr. Wolinski, his probation officer, and it says that he's doing everything according to plan.

The purpose of probation and revoking probation is to give somebody their first taste of jail. This was Mr. Granderson's first taste of jail. He'd never been to jail before. Since he's been out he has been a model supervisee, I [4] guess is the word I'm looking for. He hasn't done anything wrong, no turning back. The letter I think speaks for itself.

And the bottom line is, Judge, if Mr. Granderson had gotten out—if you look at it a couple of different ways, it would be the same. If he had gotten his original six months and three years of supervised release that he's doing a good job of like he's doing now, we would have asked for an early termination, and that early termination he would have been eligible for in February or before February. If he had gotten out in February like he was supposed to, after the court revoked his probation, and gotten three Years starting then, again we're eligible to come to the Court after a third of his supervised release and ask for early termination. Again, that would have been February.

Mr. Granderson, although the Eleventh Circuit essentially remanded this for the issue of supervised release, has been doing the right things and not—I told him "to

assume you're on supervised release," even though there's some legal question as to whether he was. He's been reporting regularly, doing everything he could. I think that the Court can feel comfortable that the taste of jail has served its intended effect, particularly when the overall circumstance of the case—and the Eleventh Circuit specifically said that this court should consider the need for supervised release, quote, in light of all the events and circumstances of this case, meaning, of course, I [5]—you know, I don't know what they mean for sure, but it seems to me that what they might have been meaning is the fact that he served more than six months, which was the max he was supposed to get.

Judge, This is a legal issue that may be decided by the Supreme Court, the ultimate issue here. The government has moved for certiorari. I can update the Court on what the courts have done since then. I have sort of mixed personal feelings. You know, when the government moves for cert. I sort of—I've never felt this sort of conflict before. It would be a lot of fun to go upthere, but at the same time, zealously representing my client, obviously I don't think it should go there.

If the court wants a quick update, there were two that had found in Your Honor's favor before the middle of 1992. Since that time the Third Circuit and then this Circuit found the way that it did. They then went back to the Ninth Circuit, which had been one of those two originally. That court rejected the Eleventh Circuit's and Third Circuit's reasoning and held to their original decision. Since that time there have been two other circuits that have come out in favor of the Eleventh and Third Circuits. So, there is a serious split here, just for the Court's edification, as to how his may come out. I certainly understand in any event why the court originally imposed 20 months. I think it was a reasoned decision that may be ultimately—

[6] THE COURT: The Cert. application on the split then is in the Granderson case, not in some other case.

MS. KING: That is correct, Your Honor.

MR. SMITH: It is in this case, Your Honor.

THE COURT: This is a good one for them to address it on.

MR. SMITH: Yes, Your Honor.

THE COURT: I think I made the issues clear.

MR. SMITH: I think you did, and your opinion is cited as an appendix in the government's cert. petition, as it has to be. The bottom line though I think is: as the law stands now in this circuit, Mr. Granderson has served five months more than he was supposed to under the law of this circuit. If that changes, obviously he'll be sent back to prison. But as it stands now, given the fact that he's served five months of extra time, the need for supervised release to accomplish the overall punitive effect doesn't seem quite so clear. And particularly since he's been out and been a model supervisee in the meantime, I submit that the need for further supervised release just isn't there.

The government's concern, in talking to Miss King, is that the fine be paid, and I think that's a legitimate concern and there is an outstanding fine that's still owed. But as I cite to the Court, there are ways that the fine will carry over and obviously be subject to contempt. The post-sentence administration of a fine is covered by 18 U.S.C. 3611 through [7] 3615, and the sample order I submitted to the court states that the fine previously ordered by the Court shall may remain in effect and shall be payable as directed under the post-sentence administration procedures described in those sections. So, I think the concern about a fine is a legitimate one but can be addressed even if Mr. Granderson's removed from the supervised release. Given the overall circumstances of this case, as the Eleventh Circuit said to consider, I think the need for further supervision is unwarranted and we would ask that Mr. Granderson essentially have the same

treatment as early termination, which is what we would me petitioning for here if he's gotten out in February, as the Eleventh Circuit said he should.

THE COURT: All right. Miss King.

MS. KING: Your Honor, as Mr. Smith said, the government's only concern in this matter is that the fine that the Court imposed is paid. My understanding is: of the $2,000 fine, there's $1,500 outstanding, and whatever is the best means by which the court believes that the fine will be paid, and will be paid, you know, without an undue burden on the government to collect it.

THE COURT: What is the real posture? The remand has been filed in this case, right?

MS. KING: Yes.

MR. SMITH: Yes, Your Honor. It's properly back before this Court.

[8] THE COURT: And when was the cert. application filed?

MR. SMITH: Judge, they sought an extension and I just got a copy of this I think Monday of this week that the cert.—

THE COURT: So, it's just filed.

MR. SMITH: —petition had just been filed.

THE COURT: All right. Obviously it won't be this term. So, if they accepted cert., it would be argued I assume next year.

MS. KING: Yes, sir.

THE COURT: Of course, you wouldn't be arguing.

MS. KING: No.

THE COURT: The Solicitor General's office would. But they've accepted it and applied for cert?

MS. KING: That's correct.

THE COURT: The Solicitor's office I mean.

MS. KING: Yes, sir.

THE COURT: There's a new solicitor already, is there not?

MR. SMITH: I don't believe so. I think it's—

MS. KING: Not that I'm aware of having been announced, Your Honor.

THE COURT: I doubt this case would swing on that personality. Most of that office—

MR. SMITH: Your Honor's correct actually.

THE COURT: —remains constant I think except for—

[9] MR. SMITH: There's an acting Solicitor General on this brief, William Bryson, so the Court is correct. I stand corrected.

THE COURT: It would be next year. I guess it's here for resentencing, or is it?

MR. SMITH: Yes, Your Honor.

MS. KING: Resentencing.

THE COURT: Well, if it got reversed again, then would it be back for resentencing again? I mean, if the cert. was accepted and the Supreme Court did as they did the last time they had the opportunity and they reversed the Eleventh Circuit in one of my cases—

MR. SMITH: I hope it won't happen here.

THE COURT: —then would it be back for resentencing again?

MR. SMITH: I believe that would be correct, Your Honor. Mr. Granderson was about—

THE COURT: He's out.

MR. SMITH: Yes, Your Honor. He was about frankly 11 days away from release to a halfway house in the 20-month sentence. He was not too far from some sort of—

THE COURT: Well, I'm more concerned right now with the procedural problem than—

MR. SMITH: Excuse me.

THE COURT: In other words, what happens? Do I [10] resentence now? Do I possibly have to resentence again later?

MR. SMITH: Judge, I think that both of those are correct. Because the mandate has been issued with directions for resentencing on the supervised release, the Court is properly here to resentence today. Should the Supreme Court accept certiorari and ultimately reverse, then it would be sent back for yet another resentencing. Or actually I guess there would be no need to resentence.

THE COURT: No. Because if they did, it would just set aside and reinstate the previous sentence.

MR. SMITH: Yes, Your Honor, that's correct.

Judge, if there's a concern about Mr. Granderson's whereabouts, I think that the court can direct him to be in touch with me on a regular basis and I could handle that. In terms of the fine, there is a fair amount still owed, but I would note that Mr. Granderson has made regular payments. He hasn't missed a one on his fine. And even though there's some unpaid, it's just because Mr. Granderson's working as a dishwasher and cook and he gets $600 a month. I think the post-administration act would cover the payment of a fine. And as I say, he's done all the things he's supposed to do, but he's living with his parents. I mean, I don't have any reason to think he's going to be going anywhere particular.

THE COURT: You know, I always viewed probation or parole or supervised released as something a little more than or a [11] little different than punishment. It's assistance to a defendant. It's punitive also in a way, but it's guidance and to aid and help a defendant structure his life in a law abiding way so as to be a contributing member of society. It's not unusual to get requests to terminate probation or terminate supervised release. I often look at them and wonder in some instances: what's the real motivation behind it? Is that person really saying that, "I really can't make it and I got to get out from under this thing because I don't want to go back to jail"?

MR. SMITH: Judge, I can tell you at least in this case this was not Mr. Granderson's prompting. We had told the court of appeals that it wasn't mandatory to impose it if the court reversed and they sent it back on my request. Mr. Granderson is not the one that promoted this.

THE COURT: Well, you're performing as lawyer. It may not be mandatory, but it's permissible I believe.

MR. SMITH: Judge, it is, and that's why we're here. You know, obviously the court has considered all the factors such as the cost to the government of having to supervise him as well.

THE COURT: Well, the cost to the government is worse. If he has to go back to jail or something, it's greater.

MR. SMITH: And if the Court's concerned about that, I think the court would be correct.

THE COURT: The cost is not significant if it's a matter of keeping somebody and developing somebody as a [12] law-abiding citizen who can be a contributing member of society as opposed to somebody who isn't.

MR. SMITH: If the court has a serious concern about that, I think you're correct that supervised release ought to be imposed. I guess the point that I would bring to the Court's attention is that Mr. Granderson had led a law-abiding life before this offense. This was his first offense. And his circumstances since being released have been ideal. This is the kind of candidate, it seems to me, that ought to be brought back to the Court for early termination consideration because he does seem to have—the guidance has helped him. I think the Court's correct. But he's gotten to the point now where it seems like it's no longer necessary since he's been complying with it by the letter after his first taste of jail.

A lot of people don't wake up until they see that first taste of jail, but I do believe there's some people that, once they get that first taste, walk the straight and narrow the rest of their life. Mr. Granderson seems to be that kind of person. His supervision has been such that he's done nothing, and there's no reason that I can see, and I don't think that the probation officer sees either, to continue him under the continued government cost of supervision. But if the court has some concern about that, I think it would be—the court's correct. I think supervised release, that's what it's here for. I just don't see anything that suggests that there's any further need at

[13] this point, particularly since he's gotten five months more than the Eleventh Circuit said he was supposed to.

There's a—I know I keep talking here. There's a last thing I'll say and then I'll be guiet. It seems to me the purpose of the early termination is to set an incentive for folks to turn around and do things right, and I think that the way in which Mr. Granderson has performed perfectly since being on supervision ought to be rewarded to some extent with early termination. I think that's what the purpose of early termination is. It does disrupt your life. The court's right. It gives guidance, but it does disrupt your life. You've got to report regularly, you got to send in monthly reports, you have to follow a lot of regulations and procedures that obviously you and I don't have to follow, and it is something of a pain to have to follow all those rules and regulations. It's obviously warranted when there's a need. I guess I just am not sure there's a need anymore. That's why I'm back before the court.

THE COURT: All right. Anything further?

MR. SMITH: Just the probation officer doesn't seem to see any need for this, and the government, unless the court feels there's a need for a fine to be enforced through continued supervision, also doesn't see any need. I submit to the court there isn't any need to keep Mr. Granderson under these responsibilities.

THE COURT: The probation officer doesn't see any need [14] for this?

THE PROBATION OFFICER: Your Honor, I think he may be speaking of the one in Virginia. I've never said that.

MR. SMITH: Just, Judge, in Mr. Wolinski's conduct report, he understands it's back for resentencing on the issue of whether there should be a vacating or early termination of supervised release order. His next paragraph then talks about how Mr. Granderson has made a satisfactory adjustment, has done everything he's supposed to. I think if Mr. Wolinski felt there was a further need, he would have stated it at that point of his letter. The letter was sent sometime ago. It was back in January. But the probation officer expressed no belief that continued supervision was necessary for Mr. Granderson.

THE COURT: When would the period of probation have expired had he continued on probation?

MR. SMITH: Judge, that would have been longer than after the revocation. Four to five years of supervision.

THE PROBATION OFFICER: His expiration date—

THE COURT: Would have been 1996, wouldn't it?

THE PROBATION OFFICER: Right, Your Honor. March 17th of 1996.

MR. SMITH: Obviously if he'd gotten a third of that, I would have come—and had been performing adequately, I would have come and asked for early termination at that point. Probably would have been right about this time I believe. Almost [15] a year and two-thirds would be about where we are now.

THE COURT: The point is he hasn't performed satisfactorily. We had to revoke it.

MR. SMITH: Judge, I understand that and obviously that's why we're here. At the time, his revocation was for five months more than he was supposed to get in prison. I think he's paid for that revocation adequately. And the court, this court, at the time it revoked him, expressed concerns about how it didn't seem—under the circumstances, that it seemed like an awfully harsh sentence, even by this Court's standards, and I think that that was the case. It was not the sort of time that the court wanted to give, and yet that's the amount of time that he did end up getting before the eleventh circuit reversed. I think he's paid for that.

And, you know, jail time, first taste of jail, has done the trick here, and that's why I'm submitting this to the Court. Mr. Granderson has learned his lesson, Judge.

He hasn't done anything. It's woken him up and he's performed perfectly since that time. And as I say, the probation officer doesn't seem to have any feelings that further supervision's necessary.

THE COURT: All right. In case number 91-1, United States versus Ralph Stuart Granderson, Jr., the Court having already found there was a violation of the conditions of probation and the court already having determined that the probation should be revoked, it is hereby adjudged that the [16] defendant, Ralph Stuart Granderson, Jr., should be committed to the custody of the Bureau of Prisons for a period of six months. Parenthetically stating, that time already having been served, there's no further time to be served, parenthesis. To be followed by a period of supervised release of two years, said supervised release to be under the standard provisions as adopted by this Court. And in addition thereto and specifically, the defendant's prohibited from possessing a firearm or other dangerous weapon.

The defendant, it it's determined by the probation office that he should do so, shall participate in a substance abuse program until released by the probation office. And in addition thereto, the fine, the balance of the fine imposed in the original sentence of March 18, 1991, is a special condition. Payment of that fine is a special condiction of supervised release, and that fine should be paid in full no later than six months prior to the expiration of the period of supervised release, to be paid on a regular basis to be worked out with him and the probation officer, but in no event should it run beyond the six months immediately preceding the expiration of supervised release. Anything further?

MR. SMITH: Judge, just one other thing. The court of appeals—we asked for the supervised release period to begin to run at the end of the six months and they said it wouldn't be that way, so I just want to make sure that—

[17] THE COURT: No, I'm contemplating two years. I'd previously imposed three years.

MR. SMITH: Yes, Your Honor, and I appreciate that.

THE COURT: And I'm imposing two years and I think that can run from now. I think that's what's contemplated. And you probably need that much for him to get that fine paid out within the time period I'm talking about. I can always release him from it later on if it was justified, but that's the sentence of the court at this time.

MR. SMITH: Judge, he's been under supervised release since August, the Court noted.

THE COURT: Even if you add all of that, that's still less than three years.

MR. SMITH: Yes, Your Honor. That's what I'm trying to determine.

THE COURT: All right. Anything further?

MS. KING: Nothing further.

THE COURT: All right. Now, we had—yes, sir.

MR. SMITH: I suppose Jones objections. The Court I assume, when it says making payments due six months in advance, is not inconsistent with Mr. Granderson's ability to pay.

THE COURSE: Of course not.

MR. SMITH: Okay. No objections then.

THE COURT: All right.

(Hearing concluded)

SUPREME COURT OF THE UNITED STATES

No. 92-1662

UNITED STATES, PETITIONER

v.

RALPH STUART GRANDERSON, JR.

ORDER ALLOWING CERTIORARI

Filed June 28, 1993

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted.

June 28, 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 67012

(2)

No. 92-1662

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH STUART GRANDERSON, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

THOMAS G. HUNGAR
Assistant to the Solicitor General

THOMAS M. GANNON
SUSAN M. DAVIES
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

41 pp

QUESTION PRESENTED

Under 18 U.S.C. 3565(a), a defendant who was originally sentenced to a term of probation and who is found to have violated a condition of his probation ordinarily may be continued on probation or may have his sentence of probation revoked, in which case the court may impose any other sentence "that was available" at the time of the defendant's original sentence. If the defendant is found to be in possession of a controlled substance, however, the court must revoke the sentence of probation and must sentence the defendant to "not less than one-third of the original sentence." The question presented is whether the court of appeals erred in concluding that the phrase "original sentence" as used in Section 3565(a) refers to the maximum term of imprisonment under the Sentencing Guidelines sentencing range applicable to the defendant at the time of his original sentencing hearing, instead of to the sentence of probation actually imposed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

Statutes and rule—Continued: Page

Rules:

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1662

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH STUART GRANDERSON, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 969 F.2d 980.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a-19a) was entered on August 4, 1992. A timely petition for rehearing was denied on November 30, 1992. Pet. App. 16a-17a. On February 19, 1993, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including April 15, 1993. The petition for a writ of certiorari was filed on April 15, 1993, and was granted on June 28, 1993. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES AND GUIDELINES INVOLVED

The pertinent provisions of 18 U.S.C. 3565, 18 U.S.C. 3583, and the Sentencing Guidelines are reproduced at App., *infra*, 1a-4a.

STATEMENT

1. Pursuant to a guilty plea entered in the United States District Court for the Northern District of Georgia, respondent was convicted on one count of delay or destruction of mail, in violation of 18 U.S.C. 1703(a). Pet. App. 2a. The statutory maximum penalty for respondent's offense was five years' imprisonment and a $250,000 fine. See 18 U.S.C. 1703(a), 3571. Under the Sentencing Guidelines, the potential imprisonment range, in light of respondent's adjusted offense level and criminal history category, was zero to six months. Pet. App. 2a. The district court did not impose a sentence of imprisonment, but instead imposed a sentence of five years' probation and a $2,000 fine. R1-7, at 2, 4. The conditions of respondent's probation included the requirement that he undergo periodic testing for illegal drug use. Pet. App. 2a.

On June 28, 1991, respondent's probation officer filed a petition for revocation of respondent's probation, alleging that "[respondent] has possessed/used drugs in that on 5-10-91 and 6-7-91, [respondent] rendered urine samples which tested positive for cocaine metabolite." R1-10, at 1. Thereafter, the district court held a hearing on the petition to revoke the sentence of probation. The court found that respondent had possessed controlled substances within the meaning of 18 U.S.C. 3565(a), which provides that when "a defendant is found by the court to be

in possession of a controlled substance * * * the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." Accordingly, the court revoked respondent's probation. See J.A. 16-17, 21; Pet. App. 12a-13a.[1]

Applying 18 U.S.C. 3565(a), the district court determined that it was required to sentence respondent to a prison term that was at least one-third the length of respondent's original sentence of probation. The court reasoned that the phrase "original sentence" as used in Section 3565(a) referred to the original sentence of probation actually imposed on respondent, not the potential sentence of imprisonment available under the applicable Guidelines sentencing range at the time of respondent's initial sentencing. Pet. App. 13a-14a. Accordingly, the court sentenced respondent to 20 months' imprisonment—one-third of the original five-year sentence of probation—to be followed by a three-year period of supervised release. Pet. App. 14a; J.A. 21.

2. The court of appeals upheld the order revoking respondent's probation, but vacated his sentence. Pet. App. 1a-11a. The court began its analysis by noting

---

[1] Respondent admitted having used drugs, but he argued that use did not qualify as possession so as to require revocation of probation under Section 3565(a). J.A. 9-10. The government contended that knowing and voluntary drug use is inevitably accompanied by possession. J.A. 11. The district court found in favor of the government on that issue. See J.A. 16; Pet. App. 13a. The court of appeals rejected respondent's challenge to that ruling (Pet. App. 3a-4a), and this Court denied respondent's petition for a writ of certiorari raising that issue. *Granderson* v. *United States*, cert. denied, No. 92-8824 (June 28, 1993). Accordingly, that issue is not before the Court.

the existence of a circuit conflict on the meaning of the phrase "original sentence" as used in 18 U.S.C. 3565(a). Pet. App. 5a-6a, citing *United States* v. *Corpuz*, 953 F.2d 526 (9th Cir. 1992) (holding that "original sentence" refers to the original sentence of probation), and *United States* v. *Gordon*, 961 F.2d 426 (3d Cir. 1992) (holding that "original sentence" refers to the sentencing range that was available under the Guidelines at the time the defendant was initially sentenced).[2] Aligning its decision with the Third Circuit's approach in *Gordon*, the court of appeals rejected the government's contention that the phrase "original sentence" in Section 3565(a) refers to the original sentence of probation imposed on the defendant. The court further explained that "[t]he statute does not specify whether the phrase 'original sentence' refers to the term of probation or to the range of incarceration established by the Guidelines,"

[2] Four courts of appeals—the Eleventh Circuit below, the Tenth Circuit in *United States* v. *Diaz*, 989 F.2d 391 (1993), the Sixth Circuit in *United States* v. *Clay*, 982 F.2d 959 (1993), petition for cert. pending, No. 93-52, and the Third Circuit in *United States* v. *Gordon*, 961 F.2d 426 (1992)—have held that the phrase "original sentence" as used in 18 U.S.C. 3565(a) refers to the sentencing range applicable to the defendant under the Sentencing Guidelines when the defendant was initially sentenced. Three other courts of appeals—the Fifth Circuit in *United States* v. *Sosa*, No. 92-9022, 1993 U.S. App. LEXIS 19953 (5th Cir. Aug. 3, 1993), the Eighth Circuit in *United States* v. *Byrkett*, 961 F.2d 1399 (1992), and the Ninth Circuit in *United States* v. *Corpuz*, 953 F.2d 526 (1992)—have held that the phrase "original sentence" in Section 3565(a) refers to the sentence of probation initially imposed on the defendant, so that a district court must sentence a probationer whose probation is revoked for possession of drugs to a prison term at least one-third as long as his original term of probation.

and accordingly concluded that "the rule of lenity comes into play" to resolve that ambiguity in favor of criminal defendants. Pet. App. 6a.

Noting that respondent's Guidelines sentencing range was zero to six months' imprisonment, the court of appeals declined to construe Section 3565(a) to permit imposition of a longer sentence upon revocation of probation. The court reasoned that "[t]he length of [respondent's] original sentence is limited by the Guideline range available at the time that he was sentenced to probation. If [respondent] could not be subjected to [20] months incarceration for the crime of which he was convicted, he cannot now be sentenced to that term for violation of his probation." Pet. App. 8a.

The court declined to follow the contrary reasoning of the Ninth Circuit in *United States* v. *Corpuz*, 953 F.2d 526 (1992), and the Eighth Circuit in *United States* v. *Byrkett*, 961 F.2d 1399 (1992). See Pet. App. 8a-9a & n.3. In concluding that the phrase "original sentence" referred to the defendant's original sentence of probation, those courts relied on the fact that probation, like incarceration, is a type of sentence under current federal sentencing law. The court of appeals found that reasoning to be flawed because "[p]robation and imprisonment are not fungible." *Id.* at 9a.

The court of appeals also rejected the Ninth Circuit's reliance on analogous language in 18 U.S.C. 3583(g). Under that provision, a defendant who possesses controlled substances while on supervised release must have his supervised release terminated and must be sentenced to "not less than one-third of

the term of supervised release." Reasoning that supervised release is "different from probation," the court of appeals rejected the contention that Section 3565(a) and Section 3583(g) should be construed in a similar fashion to achieve similar sentencing results. Pet. App. 9a-10a.

Instead, the court of appeals pointed to 18 U.S.C. 3565(b), which provides that when a defendant possesses a firearm while on probation the court shall revoke the defendant's probation and sentence the defendant to "any other sentence that was available" at the time of the initial sentencing. Conceding that the language of Section 3565(b) differs from the relevant language of Section 3565(a), the court nonetheless found it "unlikely" that Congress "intended that the use of two slightly different phrases in two otherwise similar provisions would lead to such dramatically different results." Pet. App. 10a. Accordingly, the court vacated respondent's sentence of imprisonment. Because respondent had already served more than the six-month sentence of imprisonment that was the maximum that could have been imposed under the court of appeals' interpretation of Section 3565(a), the court ordered that respondent be released immediately.

SUMMARY OF ARGUMENT

Under 18 U.S.C. 3565(a), when a defendant possesses illegal drugs while on probation, the district court must "revoke the sentence of probation" and "sentence the defendant to not less than one-third of the original sentence." The court of appeals held that the phrase "original sentence" as used in Section 3565(a) refers to the Sentencing Guidelines range

that was applicable at the time the defendant was sentenced. That interpretation is refuted by the language, structure, and legislative history of the statute.

The drug-possession revocation provision of Section 3565(a) expressly mandates that probationers who possess controlled substances must have their probation revoked, and in context it is clear that those probationers must then be sentenced to a term of imprisonment. A contrary reading of the statute would make no sense at all, because it would require a court to impose a term of probation only one-third as long as the term the probationer was already serving. Every court of appeals to address this issue has agreed that the mandatory revocation provision of Section 3565(a) requires imposition of a term of imprisonment. Thus, the only remaining question is how long that term must be.

The ordinary meaning of the word "original" as used in Section 3565(a) is "initial." Thus, the natural meaning of the phrase "original sentence" is the sentence the defendant received at his initial sentencing. The court of appeals' conclusion that "original sentence" means the Guidelines range applicable at the initial sentencing is impossible to square with the language, structure, and purpose of Section 3565(a). In the first place, Section 3565(a) applies only to defendants who are on probation. In all cases to which Section 3565(a) applies, therefore, the Guidelines imprisonment range was available to, but rejected by, the sentencing court in favor of a sentence of probation. The court of appeals' conclusion that "original sentence" means the Guidelines range that was rejected at the initial sentencing thus

requires that the term "original" be read to mean "initially available but rejected."

When a defendant's probation is revoked for any violation of a condition of probation other than possession of a controlled substance, Section 3565 directs the district court to impose any other "sentence that was available * * * at the time of the initial sentencing." 18 U.S.C. 3565(a)(2) and (b). The court of appeals construed that phrase and "original sentence" to be equivalent, but "available" is simply not the same as "original," and Congress's use of different words in the same statute suggests that it intended them to have different meanings. That assumption is particularly strong in this case, because the drug-possession revocation provision of Section 3565(a) begins with the phrase "[n]otwithstanding any other provision of this section," thereby rebutting any suggestion that Congress intended there to be no differences between that provision and the remainder of Section 3565(a).

A review of other statutory provisions that include the phrase "original sentence" demonstrates that Congress invariably uses that phrase to refer to the initial sentence that was actually imposed on a defendant, not the range of sentences that was available to, but rejected by, the sentencing court. There is no reason to believe that Congress intended the phrase to have a different meaning in Section 3565(a).

The court of appeals' analysis is further flawed by the fact that the Guidelines sentence that was available at a probationer's initial sentencing hearing is always a range, often zero to six months' imprisonment. The logic of the court of appeals' opinion would

suggest that Section 3565(a) mandates a minimum term of imprisonment equal to only one-third of that Guidelines range, or zero to two months. Under that approach, the effect of Section 3565(a) would be to permit many defendants who possess drugs while on probation to receive no term of imprisonment at all, while at the same time freeing them of their previous probation obligations as well.

Perhaps in recognition of that flaw in equating the "original sentence" with the Guidelines range, the court of appeals appears to have assumed that the statutory "one-third of the original sentence" is to be computed by reference solely to the top of the initially applicable Guidelines range. Nothing in the logic of the court's opinion provides any basis for that assumption, however, or explains why the minimum sentence under Section 3565(a) could not more appropriately be determined by reference to the *bottom* of the applicable Guidelines range.

The background of Section 3565(a) confirms that Congress intended to require a substantial period of incarceration for probationers found in possession of controlled substances. The drug-possession revocation provision was added as part of the Anti-Drug Abuse Act of 1988, and the text and legislative history of that Act make unmistakably clear Congress's intent to deter drug use and possession by imposing harsh new penalties on persons who engage in those activities. Construing Section 3565(a) to permit imposition of a new and shorter sentence of probation or a sentence of imprisonment that is only one-third as long as the original Guidelines range would undermine that congressional intent.

Moreover, the 1988 Act amended federal sentencing law to require that persons who possess controlled substances while on supervised release would have their supervised release revoked and be sentenced to a term of imprisonment that was "not less than one-third of the term of supervised release." That provision was contained in the same section of the 1988 Act as the drug-possession provision of Section 3565(a), and both provisions were directed at precisely the same problem, so it is reasonable to construe them *in pari materia* to call for parallel treatment of drug offenders who are under non-custodial supervision.

The rule of lenity is not applicable in this case. That rule comes into play only in cases involving a "grievous ambiguity or uncertainty in the language and structure of the Act" that cannot be resolved by recourse to the normal tools of statutory construction. *Chapman* v. *United States*, 111 S. Ct. 1919, 1926 (1991). In this case, the language of the statute unambiguously provides that a defendant's sentence of imprisonment upon revocation of probation for possession of a controlled substance must be at least one-third as long as the original sentence of probation, and accordingly there is no room for lenity.

ARGUMENT

A CONVICTED DEFENDANT WHO POSSESSES CONTROLLED SUBSTANCES WHILE ON PROBATION MUST HAVE HIS PROBATION REVOKED AND BE SENTENCED TO A TERM OF IMPRISONMENT THAT IS AT LEAST ONE-THIRD THE LENGTH OF HIS ORIGINAL SENTENCE OF PROBATION

Under 18 U.S.C. 3565(a), when a defendant possesses illegal drugs while on probation the district court must "revoke the sentence of probation" and "sentence the defendant to not less than one-third of the original sentence." The court of appeals held that the phrase "original sentence" as used in Section 3565(a) refers to the Sentencing Guidelines range that was applicable at the time the defendant was sentenced, not the sentence of probation that the defendant actually received.

The court of appeals' interpretation of Section 3565(a) is refuted by the language, structure, and legislative history of the statute. The only reasonable construction of Section 3565(a) is that it mandates a sentence of imprisonment that is at least one-third as long as the defendant's original sentence of probation. That conclusion can be reached in three steps. First, under current law probation is a kind of sentence, so there is no anomaly in the statute's reference to the term of probation as the "original sentence" imposed on a probationer. Second, when a probationer is found in possession of controlled substances, Section 3565 requires the sentencing court to revoke his sentence of probation and impose a sentence of imprisonment in its place; a reimposition of probation is not permitted. Third, the sentence of imprisonment must be at least one-third as long as the sentence of probation that it replaces.

A. Probation Is A "Sentence" Within The Meaning Of Section 3565

The language and legislative history of the governing statute make clear that probation is a "sentence" for purposes of federal sentencing law in general and Section 3565 in particular. Prior to 1984, the federal sentencing scheme treated probation as an alternative to a sentence, rather than as a sentence in its own right. See 18 U.S.C. 3651 (1982) (authorizing district courts to "suspend the imposition or execution of sentence and place the defendant on probation"); see generally *United States* v. *Corpuz*, 953 F.2d at 528. In the Sentencing Reform Act of 1984, however, Congress worked substantial changes in the system of federal sentencing. See Pub. L. No. 98-473, § 212, 98 Stat. 1987. In particular, the Act rejected the traditional view of probation as merely a reprieve from a prison sentence. As the Committee Report accompanying that Act declared, "[p]roposed 18 U.S.C. 3561, unlike current law, states that probation is a type of sentence rather than a suspension of the imposition or execution of a sentence." S. Rep. No. 225, 98th Cong., 1st Sess. 88 (1983).

The text of Section 3565 itself makes clear that the word "sentence" encompasses probation. The first portion of Section 3565(a) provides that when a probationer violates a term of his probation, the court ordinarily may either continue him on probation or "revoke the sentence of probation." If the probationer is found in possession of drugs or a firearm, the statute mandates revocation of "the sentence of probation." 18 U.S.C. 3565(a) and (b). Those several references to probation as a "sentence" in the very section at issue here make clear that Congress did not mean to exclude the sentence of probation when

it referred to the defendant's "original sentence" in connection with the drug-possession revocation provision in Section 3565(a).

Other provisions of Title 18, Chapter 227, Subchapter B of the United States Code—the portion of the Code that governs probation—also refer to probation as a form of sentence. See 18 U.S.C. 3561(a) ("A defendant * * * may be sentenced to a term of probation."); 18 U.S.C. 3563(a) ("a sentence of probation"); 18 U.S.C. 3564(a) ("A term of probation commences on the day that the sentence of probation is imposed."). In keeping with that statutory mandate, the United States Sentencing Commission has declared that probation is a type of sentence under current law. See Sentencing Guidelines § 7A2(a) ("the Sentencing Reform Act recognized probation as a sentence in itself"). Thus, there can be no dispute that probation is a "sentence" as that word is used in Section 3565.[3]

[3] Some courts of appeals have erroneously concluded that probation is not a sentence and have relied on that conclusion as a basis for holding that the phrase "original sentence" in Section 3565(a) does not refer to the defendant's original sentence of probation. See *United States* v. *Clay*, 982 F.2d 959, 962 (6th Cir. 1993) (declining to treat probation as a "sentence" for purposes of Section 3565(a) because "the term 'original sentence' should mean what it has always meant—a sentence of imprisonment"), petition for cert. pending, No. 93-52; *United States* v. *Gordon*, 961 F.2d 426, 432 (3d Cir. 1992) (holding that statutory references to probation as a "sentence" worked "merely a change in form, rather than substance," and thus that Congress could not have intended the phrase "original sentence" to refer to the original sentence of probation). The court of appeals in this case conceded that probation is a sentence under current law (Pet. App. 5a), but nonetheless relied on the Third Circuit's errone-

B. When A Probationer Is Found In Possession Of Controlled Substances, The Court Must Revoke Probation And Impose A Term Of Imprisonment

The statutory language leaves no doubt that when a probationer is found to be in possession of controlled substances, Section 3565 mandates that his probation be revoked and that he be sentenced to a term of imprisonment. The statute is explicit that, upon a finding that the probationer has possessed drugs during his term of probation, the sentencing court must revoke his probation. While the statute does not expressly state that the court must then impose a sentence of imprisonment, the language of the statute, in context, makes it clear that imprisonment is required.

Section 3565(a) provides that a court normally has two options when a defendant violates a condition of his probation. First, the court may continue the defendant on probation, with or without extending the term of probation or modifying or enlarging the probationary conditions, see 18 U.S.C. 3565(a)(1). In the alternative, the court may revoke the sentence of probation and impose "any other sentence that was available * * * at the time of the initial sentencing," 18 U.S.C. 3565(a)(2). By distinguishing between revocation of probation and its continuation, Section 3565(a) makes it clear that the consequence of revocation is that the probationer is no longer to enjoy the benefits of probation, and that a different sentence must be imposed in its place. Accordingly, the provision in Section 3565(a) that requires a court to revoke the probation of a defendant who is found in possession of controlled substances cannot be read to permit the imposition of a new sentence of probation; instead, it requires the termination of conditional release and the imposition of a sentence of imprisonment in its place.

---

ous reasoning in *Gordon* as a basis for concluding that respondent's sentence of probation was not his "original sentence." Pet. App. 9a.

If the statute were read to permit the reimposition of probation after the mandatory revocation required in the case of drug-possession violations, the mandatory minimum term requirement would make no sense at all, since it would "require" a court to impose a term of probation only one-third as long as the term the offending probationer was already serving. By imposing a mandatory revocation requirement, Congress plainly intended to terminate the defendant's enjoyment of probation, as it did in the related provision requiring mandatory revocation of probation for probationers found in possession of a firearm, 18 U.S.C. 3565(b).

The court of appeals in this case, like every court of appeals that has addressed this issue, acknowledged that the mandatory revocation provision of Section 3565(a) requires the imposition of some term of imprisonment. See Pet. App. 4a; *United States* v. *Diaz*, 989 F.2d 391, 391 n.1 (10th Cir. 1933); *United States* v. *Clay*, 982 F.2d 959, 964 (6th Cir. 1993), petition for cert. pending, No. 93-52; *United States* v. *Gordon*, 982 F.2d at 964. The only remaining question is how long that term of imprisonment must be.

C. The Phrase "One-Third Of The Original Sentence" In Section 3565 Means A Period Of Imprisonment One-Third As Long As The Original Sentence Of Probation Imposed On The Defendant

The United States Code does not contain a definition of the word "original" as it is used in Section

3565(a). Accordingly, that word should be given "its ordinary or natural meaning." *Smith* v. *United States*, 113 S. Ct. 2050, 2504 (1993); see *Chapman* v. *United States*, 111 S. Ct. 1919, 1925 (1991); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). In this context, the word "original" plainly means "initial." *Webster's Third New International Dictionary* 1592 (1986). The "ordinary or natural meaning" of the phrase "original sentence," then—as common sense would suggest—is the sentence that a defendant receives at his initial sentencing, *i.e.*, the sentence imposed at the beginning of a defendant's placement in the correctional system.

The court of appeals rejected that common-sense reading of the phrase "original sentence," concluding instead that it refers to the presumptive range of imprisonment that was prescribed by the Sentencing Guidelines at the time of the defendant's initial sentencing. That conclusion, however, is impossible to square with the language, structure, and purpose of Section 3565(a).

1. Section 3565 applies only to defendants who are on probation. In order for a defendant to be subject to the requirements of Section 3565(a), therefore, it must be the case that he did not receive a sentence of imprisonment from within the range suggested by the Guidelines at his initial sentencing. Thus, in all cases to which Section 3565(a) applies, the presumptive imprisonment range prescribed by the Guidelines is a sentence that was available to, but was rejected by, the sentencing court at the defendant's initial sentencing. In effect, then, the court of appeals' holding—that the phrase "original sentence" refers to the Guidelines range rather than the sentence of probation that was actually imposed—rests on the curious construction of the word "original" in Section 3565(a) to mean "initially available but rejected."

That is not one of the possible meanings of the word "original" as it is used in the English language: "original" simply does not mean "available," as opposed to "actual"; it means "initial," as opposed to "subsequent" or "final." As Judge Greenberg cogently observed in *United States* v. *Gordon*, "as a simple matter of plain meaning, I do not understand how the term 'original sentence' * * * can be equated to the maximum available sentence under the guideline range in cases such as this where the maximum available sentence has not been imposed. To me the term 'original sentence' means an actual as contrasted to an 'available' sentence." 961 F.2d at 434 (Greenberg, J., concurring in judgment).

2. Even if the meaning of the phrase "original sentence" were not clear on its face, the context of that phrase would compel the conclusion that it refers to the actual sentence of probation that was initially imposed on a defendant, not the range of custodial sentences that could have been imposed.

a. When a defendant's probation is revoked for possession of a firearm or for any other violation of a probation condition (except possession of a controlled substance), Section 3565 directs the district court to impose any other sentence "that was available * * * at the time of the initial sentencing." 18 U.S.C. 3565(a)(2) and (b). Although the court of appeals construed the phrase "available * * * at the time of the initial sentencing" as equivalent to the phrase "original sentence" in Section 3565(a), Pet. App. 10a, the term "available" is simply not the same

as "original." In fact, the two terms have sharply different meanings, and in the absence of any other plausible explanation it must be assumed that Congress used those two different words in the same statute because it wished to convey different meanings. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991).

That assumption is particularly compelling in this case, because the "original sentence" language of Section 3565(a) and the "sentence that was available * * * at the time of the initial sentencing" language of Section 3565(b) are both part of a short statutory provision, and were both added to Title 18 as part of the same legislation. See Pub. L. No. 100-690, §§ 6214(2), 7303(a)(2), 102 Stat. 4361, 4464. Had Congress intended the two amendments to have the same meaning, it is reasonable to suppose that Congress would have used the same language in each.

b. A further indication that Congress meant the phrase "original sentence" to have a meaning distinct from the phrase "sentence that was available" is that the portion of Section 3565(a) dealing with the revocation of probation for persons found in possession of drugs begins with the phrase "[n]otwithstanding any other provision of this section." That phrase rebuts any suggestion that Congress intended there to be no inconsistencies between the general revocation provision of Section 3565(a) and the provision dealing with drug-possession revocations. The court of appeals thus erred in imposing on the phrase "original sentence" a meaning that would be unrecognizable to the lay reader solely in order to render that phrase "consistent with the rest of the statute." Pet. App. 10a; see also *United States* v. *Clay*, 982 F.2d at 963; *United States* v. *Gordon*, 961 F.2d at 431.

c. A review of other statutory provisions that include the phrase "original sentence" demonstrates that Congress invariably uses that phrase to refer to the initial sentence that was actually imposed on the defendant, not the range of sentences that were available to, but rejected by, the sentencing court. For example, district courts are authorized to correct previously imposed sentences when a case is remanded "for further sentencing proceedings if, after such proceedings, the court determines that the *original sentence* was incorrect." Fed. R. Crim. P. 35(a)(2) (emphasis added). Obviously, the "original sentence" referred to in Rule 35(a)(2) cannot be a sentence that was available at the time of the initial sentencing but that was rejected in favor of some other sentence; rather, it means precisely what the natural import of the words suggests: the sentence that was actually imposed on the defendant.

Similarly, in authorizing rehearings in military court-martial cases, Congress has declared that "[u]pon a rehearing * * * no sentence in excess of or more severe than the *original sentence* may be imposed, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory." 10 U.S.C. 863 (emphasis added). The phrase "original sentence" as used in that statute plainly refers to the sentence that was imposed after the original court-martial, not to the potential alternative sentences that were rejected.

Finally, the United States Parole Commission has statutory authority to respond to parole violations in a number of ways, including by "refer[ring] the parolee to a residential community treatment center

for all or part of the remainder of his *original sentence*." 18 U.S.C. 4214(d)(4) (1982) (emphasis added) (repealed as to crimes committed after November 1, 1987, see Pub. L. No. 98-473, Tit. II, § 218(a)(5), 98 Stat. 2027). That provision would be nonsensical if the phrase "original sentence" were construed in the manner suggested by the court of appeals in this case.

3. The court of appeals' interpretation of the phrase "original sentence" is further flawed by the fact that the sentence of imprisonment that could have been imposed at the initial sentencing hearing in lieu of probation is generally not determinate. In all cases in which probation is available, the Guidelines set forth a presumptive range of imprisonment: 0-6 months, 1-7 months, 2-8 months, 3-9 months, 4-10 months, or 6-12 months. See Sentencing Guidelines, ch. 5, pt. A (Sentencing Table); *id.* § 5B1.1(a); App., *infra*, 3a-4a. It is awkward, at best, to speak of imposing a sentence that is "not less than one-third of" a *range* of imprisonment. Yet that is the logical import of the court of appeals' construction of the statute.

Moreover, the court of appeals' interpretation, if applied literally, would lead to a result clearly at odds with the purpose of the statute. Many of the crimes for which probation is available in lieu of imprisonment carry presumptive sentencing ranges of zero to six months. See Sentencing Guidelines, ch. 5, pt. A (Sentencing Table); *id.* § 5B1.1(a); App., *infra*, 3a-4a. The logic of the court of appeals' opinion would thus suggest that Section 3565(a) mandates a minimum term of imprisonment equal to one-third of that range, *i.e.*, zero to two months. As a result, the drug possession sentencing provision of Section

3565(a), which was intended to ensure that many probationers found to have violated probation by possessing drugs should serve a significant mandatory period of incarceration, could result in probation violators serving no term of imprisonment at all, and being freed from their previous probation obligations as well.

Perhaps in recognition of that difficulty with its interpretation of the statute, the court of appeals appears to have assumed (and other courts have expressly held) that the statutory minimum "one-third of the original sentence" is to be computed by reference solely to the top of the Guidelines sentencing range that was applicable at the defendant's initial sentencing. See *United States* v. *Gordon*, 961 F.2d at 431; *United States* v. *Clay*, 982 F.2d at 964. Even assuming that those courts were correct in holding that "original sentence" refers to the Guidelines range applicable at the initial sentencing hearing, however, it is difficult to discern any basis for concluding that only the maximum Guidelines sentence is to be considered for purposes of Section 3565(a). None of the courts that have adopted that reading of the statute has offered any justification for doing so, and there is nothing in the logic of those courts' opinions that explains why the minimum sentence under Section 3565(a) could not more appropriately be determined by reference to the minimum term of imprisonment that was originally available under the Guidelines. That those courts must disregard the logic of their own statutory analysis in order to avoid an absurd result is further proof that their interpretation of Section 3565(a) is fundamentally flawed.

The implausibility of those courts' interpretation of Section 3565(a) is further demonstrated by the fact that the maximum sentence of imprisonment prescribed by the Guidelines is merely a presumptive sentence from which the sentencing court may depart in appropriate circumstances. 18 U.S.C. 3553(b). If "original sentence" really means "maximum available sentence," as those courts have apparently concluded, the appropriate benchmark for purposes of Section 3565(a) should be the maximum sentence authorized by law for the defendant's crime—in this case, five years' imprisonment. See 18 U.S.C. 1703(a). Thus, it appears that what the court of appeals has actually held in this case is that "original sentence" means "maximum available sentence under the Sentencing Guidelines without consideration of a possible departure from the Guidelines sentencing range." That is too much weight for the simple statutory phrase "original sentence" to bear.

D. The Background Of Section 3565(a) Confirms That Congress Intended To Require A Substantial Period Of Incarceration For Probationers Found In Possession Of Controlled Substances

1. The drug-possession provision of Section 3565(a) was enacted as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, which was the culmination of a comprehensive effort by Congress to address the problems created by drug abuse. The text and legislative history of that Act manifest Congress's intent to impose enhanced punishments on persons who use and possess illegal drugs.

a. The text of the 1988 Act makes unmistakably clear Congress's intent to reduce drug abuse by increasing the disincentives to drug possession and use by individuals. The Act's statement of purpose endorses "proposals to attack directly the supply of, and demand for, illicit drugs, such as proposals to strengthen and expand penalties for sale and use." 1988 Act § 6201(2), 102 Stat. 4359. In addition, the Act contains congressional findings that "illegal drug use is prevalent in the workplace and endangers fellow workers, national security, public safety, company morale, and production," and that "winning the drug war not only requires that we do more to limit supply, but that we focus our efforts to reduce demand." 1988 Act § 5251(a)(9) and (21), 102 Stat. 4309-4310.

In keeping with those findings, Congress mandated a number of harsh new penalties for persons who possess and use illegal drugs. The Act provides, *inter alia*, that persons who possess illegal drugs are to be denied federal benefits (1988 Act § 5301(b), 102 Stat. 4311); that public housing tenants who engage in illegal drug-related activity will have their tenancies terminated (1988 Act § 5101, 102 Stat. 4300); and that federal contractors and grant recipients will be required to maintain drug-free workplaces and to discipline employees who use or possess illegal drugs (1988 Act §§ 5152(a), 5153(a), 102 Stat. 4304-4305, 4306). The Act also directs the President to transmit to Congress a report recommending other methods to "achieve the goal of discouraging the trafficking and possession of controlled substances." 1988 Act § 5301(g)(1)(D), 102 Stat. 4312.

In addition, the Act contains numerous provisions that dramatically increase the criminal penalties for drug possession, drug trafficking, and related conduct. See, *e.g.*, 1988 Act §§ 6371 (enhanced penalties for possession of crack cocaine), 6452 (life imprisonment for three-time drug offenders), 6457-6458 (enhanced penalties for possession of drugs with intent to distribute them near schools, playgrounds, youth centers, etc.), 6468 (enhanced penalties for federal prisoners who commit drug offenses in prison), 6480 (enhanced penalties for simple possession), 7001 (death penalty for drug-related killings), 102 Stat. 4370, 4371, 4373, 4376, 4382, 4387-4395. Finally, in the Section at issue here, the Act mandates that criminal defendants who possess controlled substances while on probation or supervised release must have their probation or supervised release revoked and receive sentences equal to "not less than one third of" their original sentence or term of supervised release. 1988 Act § 7303, 102 Stat. 4464.

b. The legislative history of the 1988 Act provides additional evidence—if any were needed—of Congress's determination to attack the demand for illegal drugs by imposing harsher punishments on drug users and possessors as well as drug traffickers. Although the Act's legislative history does not focus on the precise meaning of the provision at issue in this case,[4] there is no doubt that the Members of Congress

[4] The section-by-section analysis of the criminal law provisions of the 1988 Act, which was prepared by Senator Biden as chairman of the Senate Judiciary Committee (see 134 Cong. Rec. 32,692 (1988)), contains only the following discussion of the relevant section of the Act:

> *Section 7303* amends various provisions of title 18 relating to parole, probation and supervised release making it a mandatory condition of those alternatives to incarceration that the defendant not possess any controlled substance, and making revocation of parole, probation, or supervised release automatic upon a finding that the defendant violated that condition. This provision applies to all persons whose parole, probation, or supervised release begins on or after January 1, 1989, regardless of the date of the offense or of the imposition of sentence.

134 Cong. Rec. 32,707 (1988). No committee report was prepared for the 1988 Act itself, and the reports discussing various bills that anticipated the bill that was ultimately enacted shed no light on the precise question presented here.

who voted for the 1988 Act did so with the full understanding and intention that it would provide harsh medicine for persons who chose to use or possess illegal drugs.[5] In light of that background, it is diffi-

[5] See, *e.g.*, 134 Cong. Rec. 32,632 (1988) (remarks of Sen. Byrd) (asserting that the Act would "[s]trengthen our penalties for possession and for trafficking; [a]nd, for the first time, add strong legal disincentives for those who would casually use drugs."); *id.* at 32,633-32,634 (remarks of Sen. Dole) ("tonight we will shift attention to the other side—we will direct the spotlight on ourselves. Drug users in this country—whether addicted or an occasional abuser—are behind the problem—they are the ones to blame. * * * [W]e should blame the user—the abuser of the drug. For they are the ones who are bringing these killings into our towns and cities. * * * So for the first time in about 20 years, we will focus attention back on the crime—in most cases the felony—of possession of illicit drugs"); *id.* at 32,638 (remarks of Sen. McConnell) ("[W]hile the Federal Government has fired shots across the bow of the illegal drug industry in the past, this Congress now has aimed one below the waterline: At the drug abuser. * * *

cult to believe that Congress intended in Section 3565 to authorize courts to impose a sentence for drug possession during probation consisting of only a period of probation one-third as long as the period the defendant was already serving, or a period of imprisonment only one-third as long as the period the Sentencing Guidelines would have indicated as a proper sentence for his underlying crime.

2. That conclusion receives further support from Congress's treatment of a similar issue in the context of supervised release. Under 18 U.S.C. 3583(g), a defendant who is found in possession of a controlled substance during a term of supervised release must be sentenced to a term of imprisonment that is "not less than one-third of the term of supervised release." Congress obviously viewed that provision and Section 3565(a) as parallel and closely related, because it included both of them in the same section of the Anti-Drug Abuse Act of 1988. See Pub. L. No. 100-690, Tit. VII, § 7303(a)(2) ("one-third of the original sentence") and (b)(2) ("one-third of the term of supervised release"), 102 Stat. 4464. Those two provisions were directed at precisely the same problem, and it is therefore reasonable to construe them *in*

[The] so-called casual users continue to finance the enemy[.] * * * [T]he drug-abuser's recreational habit pays for the bullets that kill police officers and innocent bystanders in the drug war"); *id.* at 33,284 (remarks of Rep. McCollum) ("[W]e are sending a message in this bill for this first time to those who would be users and those who are users, that if they choose to go this path * * * no, they should not do it, but if they choose to go anyway, there will be a price to pay that will be higher than they want to pay."); *id.* at 33,289 (remarks of Rep. Gilman) ("This legislation stiffens penalties on drug dealers and drug users.").

pari materia to call for parallel treatment of drug offenders who are under non-custodial supervision.

Some courts of appeals have rejected the analogy between Sections 3565(a) and 3583(g), noting that the latter provision determines the minimum sentence upon revocation by reference to "the term of supervised release," whereas the former refers to the "original sentence" instead. See *United States* v. *Diaz*, 989 F.2d at 393 & n.2; *United States* v. *Clay*, 982 F.2d at 963-964; *United States* v. *Gordon*, 961 F.2d at 431 & n.5. There is no basis for concluding, however, that Congress's decision to use slightly different language in those two provisions was intended to signal any difference in approach to the treatment of defendants who possess illegal drugs while on conditional release.

Congress had to refer specifically to "the term of supervised release" in Section 3583(g) because the phrase "original sentence" would have carried a much different meaning in that context. Unlike probation, supervised release is merely a "part of" a sentence of imprisonment, not a separate sentence in its own right. 18 U.S.C. 3583(a); see also 18 U.S.C. 3551(b). Thus, in contrast to probation, which is never accompanied by a term of imprisonment, supervised release is always imposed together with a term of imprisonment. As a result, it is obvious why Congress chose not to require defendants who possess drugs while on supervised release to serve a term of imprisonment "not less than one-third of the original sentence." In the context of supervised release, the phrase "original sentence" refers not merely to the period of supervised release, but to the entire sentence of imprisonment followed by super-

vised release. Thus, use of the phrase "original sentence" in Section 3583(g) would not have achieved Congress's goal of ensuring that defendants who possess illegal drugs while enjoying the benefits of supervised release would serve a prison term of at least one-third the length of their supervised release term.

In the probation context, by contrast, the phrase "original sentence" was sufficient to achieve Congress's purpose, because in that context the "original sentence" is always a term of probation unaccompanied by a term of imprisonment. It was unnecessary for Congress to add a specific reference to probation in Section 3565(a) in order to make its meaning clear. Thus, the difference in wording between the two statutes simply underscores Congress's intent to provide similar treatment for defendants who abuse the privilege of probation or supervised release by possessing illegal drugs. In both cases, Congress intended to ensure that drug-possession violations would be punished particularly severely in relation to other violations of the terms of release. Consequently, in both cases, a floor was placed on the time the violator would spend in prison: one-third of the period for which he had been granted the privilege of conditional release.

E. The Rule Of Lenity Has No Application In This Case Because the Statute Is Not Ambiguous

The court of appeals invoked the rule of lenity to support its interpretation of the statute. See Pet. App. 6a; accord *United States* v. *Diaz*, 989 F.2d at 393; *United States* v. *Clay*, 982 F.2d at 965. As this Court has repeatedly explained, however, "the 'touchstone' of the rule of lenity 'is statutory ambiguity.'"

Bifulco v. *United States*, 447 U.S. 381, 387 (1980) (quoting *Lewis* v. *United States*, 445 U.S. 55, 65 (1980)). The rule of lenity comes into play only when, after "[a]pplying well-established principles of statutory construction," *Gozlon-Peretz* v. *United States*, 498 U.S. at 410, there is still a "grievous ambiguity or uncertainty in the language and structure of the Act" *Chapman* v. *United States*, 111 S. Ct. 1919, 1926 (1991). See also *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (court should rely on lenity only if, "[a]fter seiz[ing] everything from which aid can be derived," it is "left with an ambiguous statute"); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) ("we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute").

There is no ambiguity here. As explained above, the phrase "original sentence" is susceptible of only one interpretation in the context of Section 3565(a): it refers to the original sentence of probation that was actually imposed on the defendant. The courts of appeals that have rejected that interpretation appear to have done so not because of any "grievous ambiguity" in the language of the statute itself, but rather because they view it as an unduly harsh penalty for the possession of illegal drugs by probationers.[6] That decision was for Congress, not the

[6] See, *e.g.*, Pet. App. 10a-11a ("reading the provision as the government argues is a form of legal alchemy that would lead to unreasonably harsh results not clearly intended by Congress"); *United States* v. *Diaz*, 989 F.2d at 393 ("A sentence of imprisonment amounting to twice the amount of time per-

courts, to make, and the rule of lenity does not authorize courts to override clear congressional intent merely in order to avoid what they view as a harsh outcome. See *Gozlon-Peretz* v. *United States*, 498 U.S. at 410 (rule of lenity does not reflect "an overriding consideration of being lenient to wrongdoers"). Accordingly, the rule of lenity has no application in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

THOMAS G. HUNGAR
Assistant to the Solicitor General

THOMAS M. GANNON
SUSAN M. DAVIES
Attorneys

AUGUST 1993

---

missible under the maximum sentence at the time the offense was committed is harsh.").

APPENDIX

STATUTES AND GUIDELINES INVOLVED

1. 18 U.S.C.

§ 3565. Revocation of probation.

(a) Continuation or Revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may * * *—

(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or

(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance * * * the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.

(b) Mandatory Revocation for Possession of a Firearm.—If the defendant is in actual possession of a firearm * * * at any time prior to the expiration or termination of the term of probation, the court shall * * * revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

* * * * *

§ 3583. Inclusion of a term of supervised release after imprisonment.

(a) In General.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment * * *.

* * * * *

(e) Modification of Conditions or Revocation.—The court may * * *—

(1) terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release, * * * if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release * * *;

(3) revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised reelase wtihout credit for time previously served on postrelease supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release; or

(4) order the person to remain at his place of residence during nonworking hours * * *.

* * * * *

(g) Possession of Controlled Substances.—If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release.

2. Sentencing Guidelines (1989):

Chapter 5, Part A—Sentencing Table.

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5,6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	*
6	0-6	1-7	2-8	6-12	*	*
7	1-7	2-8	4-10	*	*	*
8	2-8	4-10	6-12	*	*	*
9	4-10	6-12	*	*	*	*
10	6-12	*	*	*	*	*

* * * * *

§ 5B1.1. *Imposition of a Term of Probation*

(a) Subject to the statutory restrictions in subsection (b) below, sentence of probation is authorized:

(1) if the minimum term of imprisonment in the range specified by the Sentencing Table in Part A, is zero months;

(2) if the minimum term of imprisonment specified by the Sentencing Table is at least one but not more than six months, provided that the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in § 5C1.1(c)(2) (Imposition of a Term of Imprisonment).

(b) A sentence of probation may not be imposed in the event:

* * * * *

(3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

§ 5B1.2. *Term of Probation*

(a) When probation is imposed, the term shall be:

(1) at least one year but not more than five years if the offense level is 6 or greater;

(2) no more than three years in any other case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60332

No. 92-1662

In The

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH STUART GRANDERSON, JR.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

STEPHANIE KEARNS
Federal Defender
Co-Counsel
GREGORY S. SMITH
Staff Attorney
Counsel of Record
Attorneys for Respondent
Ralph Stuart Granderson, Jr.

Federal Defender Program, Inc.
Suite 3512, 101 Marietta Tower
Atlanta, Georgia 30303
(404) 688-7530

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under 18 U.S.C. § 3565(a), when a court finds that a defendant has been "in possession" of a controlled substance, the court must revoke the sentence of probation and sentence the defendant to "not less than one-third of the original sentence." The phrase "original sentence" is not defined. The question presented is whether the court of appeals was correct in concluding that the phrase "original sentence" was not more than the maximum term of imprisonment under Mr. Granderson's sentencing guidelines range established at the time of his initial sentencing?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

DISTRICT COURT CASES:

CONSTITUTIONAL AND STATUTORY PROVISIONS:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No. 92-1662

In The

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH STUART GRANDERSON, JR.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Following his honorable discharge from the Army, Ralph Stuart Granderson, Jr. worked for 5½ years as a United States Postal Service carrier. Pet. Opp. App. 11a at ¶¶ 41 & 45. He regularly filed income tax returns. *Id.* 13a at ¶ 55. He had no prior convictions or even arrests. *Id.* 8a-9a at ¶¶ 27-31.

After an investigation suggested that Mr. Granderson might be tampering with mail, postal inspectors placed a "test case" letter in his mail bag and later found the letter in his shoe. *Id.* 6a-7a at ¶ 13. Mr. Granderson signed a sworn statement admitting his criminal activity. He offered to repay the money and asked, if possible, to keep his postal job. *Id.* 7a at ¶¶ 14-15.

Instead, Mr. Granderson resigned that same day from his job, which paid $29,881 annually plus benefits. *Id.* 7a at ¶ 16;

11a at ¶ 41. He surrendered his only real asset, a truck, to creditors. With $26,139 of indebtedness, he was forced to consider bankruptcy. *Id.* 13a at ¶¶ 56-57. Mr. Granderson nevertheless did not seek public assistance, but kept working. He found and maintained consistent employment, and he paid full restitution, *id.* 7a at ¶ 21, even though his wages had dropped to $4.50 per hour. *Id.* 10a at ¶¶ 38-40. At the car wash job he held from September 1990 until his incarceration for violating probation, Mr. Granderson's work habits and attendance were good. He was one of his employer's most reliable workers, his attitude toward customers was described as excellent, and his boss called him a team leader. *Id.* 10a at ¶ 38.

On January 11, 1991, Mr. Granderson pled guilty to one count of delay or destruction of mail, in violation of 18 U.S.C. § 1703(a). J.A. 4-5; Pet. App. 2a. A Presentence Report calculated his range under the United States Sentencing Guidelines of 0-6 months. Pet. Opp. App. 20a. On March 18, 1991, Judge William C. O'Kelley adopted this range, Pet. App. 12a, and imposed five years of probation, a $2000 fine and a $50 assessment. R1-7, at 2, 4.

On June 28, 1991, a probation officer petitioned to revoke Mr. Granderson's probation. The petition alleged that Mr. Granderson "possessed/used drugs in that . . . Probationer rendered [two] urine samples which tested positive for cocaine metabolite." J.A. 6-7.

At a revocation hearing held July 29, 1991, the district court found Mr. Granderson "in possession" of a controlled substance, requiring a sentence of "not less than one-third of the original sentence" under 18 U.S.C. § 3565(a). J.A. 16 & 18. The district judge noted, "The question is: What was the original sentence? In this case there was no original sentence to jail." J.A. 12.

The Government explained its position that the five years of probation represented the "original sentence." J.A. 12-13. The Assistant United States Attorney conceded, "It's very hard and I had difficulty conceptualizing probation as the sentence," but then stated, "that is the interpretation." J.A. 13.

The court told Mr. Granderson, "I just don't feel I have any choice but to revoke probation and impose 20 months." J.A. 19. The court openly declared that its sentence was unjust. *See, e.g.*, J.A. 18 ("I have real difficulty with it"); J.A. 18 ("applying a bunch of numbers in a very drastic method"); J.A. 18 ("I would certainly not impose the 20 months under the Guidelines"); J.A. 19 ("I frankly don't like it"); J.A. 20 ("it's not an interpretation I like"); J.A. 21 ("I'm very sympathetic with your argument").

> But 10 times more or a mandatory four times more [than the maximum sentence you could have received within your sentencing guideline range] is a little harsh. But that's what you get when you start dealing with statistics and mathematics instead of human beings.

J.A. 15-16.

> There's no other way to describe them other than they're harsh . . . even by my standards let me say they're harsh, and my standards are not known to be lenient.

J.A. 19.

> I don't object to your appealing this, certainly. . . . I would hope you would appeal it and win. I don't often like to be reversed, but if you did, it would be a case that wouldn't bother me on the interpretation of the law issue.

J.A. 22. The district judge imposed three years of supervised release to follow Mr. Granderson's imprisonment. J.A. 21.

Mr. Granderson appealed, and the court of appeals vacated his sentence. *United States v. Granderson*, 969 F.2d 980 (11th Cir. 1992), *cert. granted*, 113 S. Ct. 3033 (1993). The court of appeals noted first that § 3565(a) was ambiguous, in part because "[t]he statute does not specify whether the term 'original sentence' refers to the term of probation or to the range of incarceration established by the Guidelines." *Id.* at 983.

Second, the court of appeals noted that its ruling did not bar the Government from seeking further punishment if it

deemed the revocation sentence inadequate. *Id.* at 983 ("The Government was free to indict him on drug charges but chose not to do so.").

Third, the court of appeals noted the Sentencing Commission's view of probation as a trust, with penalties for violating probation treated as sanctions for breaches of that trust rather than sentencings for new criminal conduct. Because Mr. Granderson faced no more than 6 months in prison under the range established at his initial sentencing, he should not be subject to more than that for revoking probation absent a basis for departure:

> The length of Granderson's original sentence is limited by the Guideline range available at the time he was sentenced to probation. If Granderson could not be subjected to [twenty] months incarceration for the crime of which he was convicted, he cannot now be sentenced to that term for violation of his probation.

Id. at 983.

Fourth, the court of appeals disagreed with the Government's view that a term of probation was the "original sentence":

> Probation and imprisonment are not fungible. As the Third Circuit noted, probation is a form of "conditional liberty" that is likely to be longer than a term of imprisonment. In this case, *instead* of a possible six months incarceration, Granderson received five years probation, a restraint on his liberty that is less severe than imprisonment, but lasts ten times longer. The trade-off was undoubtedly worthwhile to the defendant and illustrates the fallacy of simply converting a term of probation into one of incarceration without taking these differences into account.

Id. at 984 (emphasis in original).

Finally, the court of appeals rejected the Government's claim that § 3565(a) was analogous to § 3583(g), which covers revocations if a person possesses controlled substances on supervised release:

> Supervised release . . . is different from probation. When a defendant receives a sentence of probation, it is an *alternative* to imprisonment; a defendant serving time on supervised release has already served his sentence of incarceration. . . .

Id. at 984 (emphasis in original). Finding the statute ambiguous, the court of appeals applied the rule of lenity. *Id.* at 983.

The court of appeals immediately issued its mandate and ordered Mr. Granderson released from custody. The Government filed a suggestion of rehearing *in banc*, which was denied. Pet. App. 16a-17a. The Government later filed a petition for a writ of certiorari, which was granted on June 28, 1993. J.A. 36.

In the meantime, on October 20, 1992, the court of appeals clarified its ruling and remanded the case for the district judge to decide whether supervised release should be reimposed. U.S.S.G. § 5D1.1(b) (unless incarceration exceeds 12 months, supervised release not mandatory). At a resentencing, held April 23, 1993, Mr. Granderson showed that he had complied with all conditions of supervised release in the eight months since his release from jail. J.A. 25 & 31. He worked steadily as a dishwasher and cook. J.A. 30. He reported regularly to his probation officer. He had never missed a single payment on his fine. J.A. 30. His supervising probation officer wrote a letter stating that Mr. Granderson was doing everything according to plan. J.A. 25 & 32-33. The Government stated that its "only concern in this matter is that the fine that the Court imposed is paid." J.A. 28. The court reduced Mr. Granderson's supervised release term to two years. J.A. 34. Since then, no further negative proceedings have ensued.

SUMMARY OF THE ARGUMENT

The history of probation, the language, context and application of § 3565(a), its legislative history, and the rule of lenity all support the court of appeals' interpretation.

1. Traditionally, probation has been viewed as a trust, with revocations of probation treated as breaches of that trust.

The Government seeks a radical departure from that history by forcing defendants to accept an alternative to incarceration only at the risk of substantially increasing their potential jail exposure.

Conceding this departure, the Government argues that Congress "rejected the traditional view" of probation in the Comprehensive Crime Control Act of 1984 simply by calling probation a "sentence." Nothing suggests that this amendment was anything more than a semantic change. The fundamental nature of probation was retained in every respect. The 1984 Act's legislative history confirms that the changes were not fundamental. The Sentencing Commission created by that same 1984 Act still treats probation as a trust, with revocations treated, as they traditionally were, as breaches of that trust.

2. The statutory language also rebuts the Government's view of § 3565(a). "Original sentence" is not defined, and its "ordinary" meaning, according to the Government's own definitional source, suggests that a "term of probation" cannot be the original sentence. Congress' prior uses of the phrase "original sentence" typically did not even include, much less unambiguously and exclusively mean, a term of probation.

Section 3565(a) involves a mandatory minimum penalty. It is unlikely that Congress wanted the minimum's benchmark, an "original sentence," determined by the very judges whose power Congress was trying to curtail, as would be true if "original sentence" means the "term of probation" imposed by those same judges. Congress instead wanted the mandatory minimum to be one-third of a benchmark it controlled – the guidelines, which Congress established to restrict judicial discretion and eliminate sentencing disparities.

The Government's own reading of § 3565(a) confirms that its interpretation is not the "plain" meaning. Even the Government concedes that the "natural" reading it espouses yields an absurd result: a *shorter* term of probation. Rather than conceding that this dead end suggests ambiguity, the Government asks this Court to cure this admitted problem with its analysis by adopting the "length" and rejecting the "type" of its "sentence of probation." This "hybrid" approach

exceeds any reasonable "plain" meaning of § 3565(a), and nonsensically causes the word "sentence" in the relevant passage to mean "incarceration" at one point and "probation" only twelve words later.

The more natural reading of the statute is one that does not create a "hybrid," but rather logically relies on the "length" that matches the "type" of sentence – the defendant's originally established guidelines range. Mr. Granderson shows that "original sentence" was meant as a short-hand reference to a longer antecedent phrase contained in the immediately preceding sentence, in § 3565(a)(2). Thus, when sentencing a probationer who has possessed a controlled substance, the court can no longer rely on the sentencing options available in § 3565(a)(1), but must sentence the defendant to not less than one-third of the sentence specified in § 3565(a)(2) – the "sentence that was available under subchapter A at the time of the initial sentencing," a phrase universally interpreted by courts of appeals to refer to a probationer's guideline range. This "natural" reading does not yield an absurdity that must be cured, and also is consistent with the traditional view of probation revocations as breaches of trust.

3. The context of § 3565(a) confirms this. While the Government claims that "original sentence" means the term of probation imposed, Congress' decision to use the phrase "original sentence," rather than "sentence of probation" or "sentence imposed" – phrases used repeatedly in adjoining sections – suggests that Congress intended a different meaning here.

This conclusion is bolstered by comparing § 3565(a) with the statute governing revocations of supervised release for drug possession, 18 U.S.C. § 3583(g), passed in the same section of the 1988 Act as § 3565(a). While the Government claims that Congress intended to give "parallel" treatment to persons covered by these two statutes, the statutes themselves use very different language – one-third of the "original sentence" in § 3565(a), versus one-third of the "term of supervised release" in § 3583(g). At least two lower courts have found that Congress' failure to use "term of probation" in

§ 3565(a), a phrase used elsewhere and one that would have tracked § 3583(g) if parallel treatment had been intended, proves that Congress rejected the Government's interpretation, even without resort to the rule of lenity. The Government's attempts to distinguish this conspicuous difference, through speculation as to the sections' drafting order, still fail to explain why Congress chose language so different.

Other differences also exist between § 3565(a) and § 3583(g). The supervised release provision specifies that, upon revocation, the defendant must spend the one-third term "in prison." This language is absent from § 3565(a), undercutting the Government's position that this Court can "no doubt" infer incarceration as the "type" prong of its hybrid sentence.

It is unlikely that Congress intended the "parallel" treatment the Government suggests. Supervised release and probation are not equivalent or even similar. Persons on supervised release necessarily have spent time in jail, and include the most serious criminal offenders. Those on probation, by contrast, are among the least culpable. Supervised release terms are graded according to the seriousness of the offense and are designed to be converted into prison time. This is unlike probation, since even misdemeanants can receive probation terms as long as five years.

Even if parallel treatment would be rational, the Government's view of § 3565(a) does not provide parallel treatment. Instead, it yields an odd result in which, for the same violation of drug possession, less culpable defendants (probationers) often receive longer sentences than more culpable defendants (defendants on supervised release). It is unlikely Congress intended to simultaneously adopt such an inequitable disparity.

This conclusion is bolstered by the revocation statute for drug possession on parole, also passed alongside § 3565(a). That provision provides that parole must be revoked, but gives no mandatory one-third term. The likely reason is that parole guidelines existed, and Congress relied upon them. Under those guidelines, simple drug possession yields a presumptive range, even for the worst parolees, of only 12-16 months. Again, the Government's view of § 3565(a) yields an

odd result in which the least culpable (probationers) receive *minimum* sentences for the same violation that are longer than the presumptive *maximum* for the most culpable (parolees with the poorest salient factor scores). In fact, probationers' minimum sentences would exceed the statutory *maximums* for those *convicted* of possessing drugs *in jail*.

For drug possession revocations, the parole guidelines yield ranges of 0-4 and 0-8 months for defendants with good salient factor scores – the same "good" candidates who might be eligible for probation under the guidelines system. These ranges are consistent with § 3565(a)'s reliance on the similarly severe sentences that would be created by taking one-third of a defendant's established guideline range. Reliance on parole ranges also explains that Congress was not "awkward" in having its phrase "original sentence" refer to a "range." Once established, guideline ranges for each defendant do not change. This is more stable than terms of probation, which may have been modified since their imposition.

4. Application of the Government's interpretation yields further problems. Because misdemeanants may receive up to five years of probation, the Government's view of § 3565(a) yields mandatory revocation sentences above the statutory maximum punishments. When the Sentencing Commission's revocation guidelines are analyzed, the Government's view also yields *minimum* sentences for those *possessing* drugs higher than the *maximum* ranges for those *manufacturing or distributing* the drugs.

Recognizing its problems, the Government submits what is, in essence, an *optional* "plain" meaning for this Court's consideration. The Government now suggests for the first time that "original sentence" may mean the offense statutory maximum. Even if this were a reasonably "plain" construction discovered by the Government only after years of litigation, this optional plain meaning creates even greater disparities than the Government's first "plain" meaning, and cannot be what Congress intended.

5. Rather than the "harsh medicine" the Government suggests, the Act's hurried legislative history reveals a "measured" approach, in which "user accountability" penalties

were tempered by both judicial discretion and waivers of sanctions for those agreeing to drug treatment. Except for crack cocaine, simple drug possession remained a misdemeanor even after the 1988 Act, with minimum sentences of only a $1000 fine for a first conviction, and only 15 days in jail and a $2500 fine even for *repeat* convictions. Congress did not intend for § 3565(a) to mandate long prison sentences based on the arbitrary length of probation terms, a suggestion confirmed by subsequent legislative history.

6. The court of appeals' interpretation of § 3565(a) satisfies Congress' deterrent goals. The Government can seek a serious revocation sentence, where it is warranted, even without the harsh interpretation it suggests. It can seek a long period of supervised release to follow, and a long supervised release revocation sentence for any later violation. It also can separately prosecute a defendant for drug possession.

Applying the rule of lenity in this case would further that rule's goals of minimizing the risk of discriminatory and arbitrary enforcement, and of avoiding incarceration not clearly intended by Congress. The rule of lenity would not show undue leniency to wrongdoers, since even the court of appeals' interpretation yields a minimum sentence for probation violators, found to have possessed drugs by a mere preponderance of the evidence, that is four times as long as the minimum sentence for *repeat* offenders *convicted* of possessing those same drugs. This Court should follow the majority of circuits and reject the Government's § 3565(a) analysis.

ARGUMENT AND CITATION OF AUTHORITIES

Describing 18 U.S.C. § 3565(a) as unambiguous, Gov't Br. at 29, as it must to avoid the rule of lenity, the Government contends that the "only reasonable construction" is one that "mandates a sentence of imprisonment that is at least one-third as long as the defendant's original term of probation." *Id.* at 11. Although the Government describes this construction as the "ordinary" and "natural meaning" of the statutory language, *id.* at 7 & 16, one of the three steps in its analysis involves repudiating the plain meaning it proposes.

The historical background of probation; the language, context, application and legislative history of § 3565(a); and the rule of lenity all militate against the Government's interpretation. The statute instead is best read to require the imposition of only a sentence of one-third of the sentence available under subchapter A (18 U.S.C. §§ 3551-3559) at the time of the initial sentencing.

I. Congress' Reference to Probation as a "Sentence" Was Not Meant to Overrule Centuries of Common-Law Treatment of Probation

For hundreds of years, probation has been viewed not as something equivalent to or convertible into incarceration, but as a trust, with revocations of probation treated as abuses of that trust. Probation has been described as "a period of grace" that provides "an opportunity for reformation which actual service of the suspended sentence might make less probable," *Burns v. United States*, 287 U.S. 216, 220 (1932), as "a system of tutelage," *Frad v. Kelly*, 302 U.S. 312, 318 (1937), and more recently, as "conditional liberty." *Black v. Romano*, 471 U.S. 606, 611 (1985).

> [T]he use of probation as an alternative to incarceration dates back to the year 1681. *United States v. Stine*, 646 F.2d 839, 841 (3d Cir. 1981); *see also id.* at 841-42 (first state probation statute enacted in 1878; federal probation statute enacted in 1925). To say that the nature of probation is well-settled would be an understatement.

United States v. Gordon, 961 F.2d 426, 432 (3d Cir. 1992).[1]

This historical treatment of probation is inconsistent with the Government's proposed § 3565(a) interpretation. Rather than treating probation as a trust, the Government's view

---

[1] Probation revocations are not treated as sentences for new criminal conduct because the Government can bring a separate criminal charge if it is dissatisfied with the revocation sentence. *See Granderson*, 969 F.2d at 983 ("Possession of cocaine provided the reason for revocation of probation, but it is not the crime for which Granderson is incarcerated.").

forces probationers to accept an alternative to incarceration only at the price of subjecting themselves to the risk of a far higher minimum revocation sentence than their original maximum guideline sentence.

Conceding radical departure from common law, the Government claims that the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987 (the "1984 Act"), by calling probation a "sentence," thereby "rejected the traditional view of probation." Gov't Br. at 12. While Congress obviously *could* reject this history of probation, the Sixth Circuit was probably reasonable in noting, "Given this traditional understanding of probation, the onus was on Congress to make it absolutely clear" that its changes were meant to abandon several hundred years of precedent. *United States v. Clay*, 982 F.2d 959, 962 (6th Cir. 1993), *cert. filed*, No. 93-52 (U.S. filed July 6, 1993).

The fundamental changes in probation suggested by the Government are not revealed in the Act or its legislative history. The 1984 Act codifies that probation is still an alternative to incarceration. 18 U.S.C. § 3551(b). Unlike traditional sentences, which are final and cannot be increased once imposed, probation remains within a court's jurisdiction and may be modified later. *Id.* § 3563(a); *see* S. Rep. No. 98-225, at 99, 1984 U.S.C.C.A.N. 3282 ("This provision brings forward the substance of current law."). Unlike traditional sentences, a person whose probation is revoked cannot claim credit for non-custodial "street time" spent on probation, on the ground that this was service of a "sentence."

The legislative history of the 1984 Act confirms that calling probation a "sentence" was meant as a semantic change:

> In keeping with modern criminal justice philosophy, probation is *described as* a form of sentence rather than, as in current law, a suspension of the imposition or execution of sentence.

S. Rep. No. 98-225 at 88, 1984 U.S.C.C.A.N. at 3271 (emphasis added). The change was made to promote the Act's goal of honesty in sentencing. S. Rep. No. 98-225, at 56, 1984 U.S.C.C.A.N. at 3239 ("Under the bill, the sentence imposed

by the judge will be the sentence actually served."). The Senate Report stressed that the Act's changes were *not* fundamental. While "split sentences" technically were eliminated, the Report noted, "The same result may be achieved by a more direct and logically consistent route – under sections 3581 and 3583, the court may provide that the convicted defendant serve a term of imprisonment followed by a term of supervised release." *Id.* at 89, 1984 U.S.C.C.A.N. 3272. Calling probation a sentence was "merely a change in form, rather than substance." *Gordon*, 961 F.2d at 432.

The Sentencing Commission created by this same 1984 Act confirms that probation revocations are still to be treated as breaches of trust. As noted by the court of appeals:

> [T]he Sentencing Commission established that resentencing for violations of probation should sanction primarily the "defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator." The Guidelines explicitly reject resentencing violators for the particular conduct triggering the revocations "as if that conduct were being sentenced as new federal criminal conduct."

Granderson, 969 F.2d at 983 (citations omitted).

Calling probation a "sentence" was not designed to force an increase in probationers' revocation sentences. The 1984 Act's changes instead were designed to "permit latitude" and allow courts to be "more flexible" than previous law: "[T]his flexibility will permit the court to formulate a sentence best suited to the individual needs of the defendant." S. Rep. No. 98-225, at 89, 1984 U.S.C.C.A.N. at 3272. *See also id.* at 39, 1984 U.S.C.C.A.N. at 3222 (revisions "should assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case"). The Act's changes also were designed "as a means of achieving the purposes of sentencing set forth in section 3553(a)(2)." *Id.* at 90, 1984 U.S.C.C.A.N. at 3273. Section 3553 specifically provides that the sentence imposed shall be

"sufficient, but not greater than necessary, to comply with" those purposes.

Thus, rather than being abandoned in the 1984 Act, "judicial discretion" and "minimum necessary sentences" were embodied within it. Nothing in the 1984 Act or the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (the "1988 Act"), shows that Congress "rejected the traditional view" of probation. *Gordon*, 961 F.2d at 432 ("It is inconceivable to us that Congress intended to modify over three hundred years of jurisprudence through a minor statutory provision."). Because there is no clear indication of a "contrary direction" from the "cluster of ideas" surrounding courts' understanding of probation, *Evans v. United States*, 112 S. Ct. 1881, 1885 (1992), this history of probation strongly undermines the Government's suggested view of § 3565(a).

II. The Language of the Statute Favors the Court of Appeals' Interpretation of § 3565(a)

The Government claims that the court of appeals' decision is "impossible to square with the language, structure and purpose of [§] 3565(a)." Gov't Br. at 16. The Government's attempt to shift the burden is improper. The Government must present an unambiguous statute; otherwise, the rule of lenity must be applied even if the ambiguity causes concern with the court of appeals' interpretation as well. *Ladner v. United States*, 358 U.S. 169, 178 (1958) (apply rule of lenity when "no more than a guess as to what Congress intended"). More importantly, once the statute is examined, the court of appeals' view of § 3565(a) is more consistent with the natural meaning of the phrase than the Government's interpretation.

A. The Words of the Statute Support the Court of Appeals' Analysis

1. The Government concedes that there is no "definition of the word 'original' as it is used in Section 3565(a)." Gov't Br. at 15-16. It therefore must rely on the "natural" meaning

of the statute to support its contention that the phrase is unambiguous.

2. The term of probation is not the "original" sentence. While the Government cites Webster's for its claim that "the word 'original' plainly means 'initial,' " Gov't Br. at 16, the Government quotes only part of the Webster's definition. The *entire* definition of "original," used as an adjective, follows:

> original (adj) 1a: of or relating to a rise or beginning; existing from the start; initial; primary; pristine; <original plans called for many films to be made simultaneously – Cecile Starr> <the forests were in large part original – J.M. Mogey>; b: constituting a source, beginning or first reliance <the original account of the mutiny . . . as recorded by two of the survivors – F.R. Dulles>; 2a: taking independent rise; having spontaneous origin; *not secondary, derivative or imitative*; fresh, new <gives us, as all good poetry does, an original angle of vision – C.D. Lewis>; b: gifted with powers of independent thought, direct insight, or constructive imagination; creative, fertile, germinal, inventive <esteemed as an original American composer>; c: constituting the product or model from which copies are made <found the original manuscript of which copies had long been current> syn see new

Webster's Third New International Dictionary 1592 (1986) (emphasis added). When this entire definition is examined, Mr. Granderson's 0-6 month sentencing range best fits the ordinary and natural meaning of "original sentence." As the first individual sentencing determination made of Mr. Granderson, his established range was the sentence "of or relating to a rise or beginning;" the sentence "constituting a source;" the sentence "constituting the product or model from which copies are made."[2] Mr. Granderson's term of probation, by

---

[2] The Government incorrectly claims Mr. Granderson seeks to *substitute* the word "available" for "original." Respondent has never argued that a probationer possessing drugs must receive one-third of the "available"

contrast, is exactly what Webster's says is *not* original, since it is "secondary" to and "derivative" from the "source," Mr. Granderson's guidelines range. *See also* 18 U.S.C. § 3742 (describing sentence imposed as "otherwise final" sentence).

3. The term of probation also was not meant to be the "sentence" in § 3565(a)'s "original sentence." Even the Assistant United States Attorney admitted that it was "very hard" and "difficult[] conceptualizing probation as the sentence." Congress' other uses of the phrase "original sentence" confirm this.

In 18 U.S.C. § 4214(d)(4), Congress discusses the Parole Commission's ability to "refer the parolee to a residential community treatment center for all or part of the remainder of his original sentence." Obviously, "sentence" in this context refers to incarceration, and could not have meant "term of probation," since the Parole Commission has no authority over a probationer.

Similarly, the court-martial statute, 10 U.S.C. § 863, states that "[u]pon a rehearing . . . no sentence in excess of or more severe than the original sentence may be imposed." In this context as well, "original sentence" clearly meant incarceration, and did not include probation. This language was added in 1956, at a time when the Government concedes probation was not even called a "sentence." Congress' past uses of "original sentence," in contexts in which probation was not even theoretically included, hardly suggests that probation is now to be its exclusive meaning.

The Government nevertheless also cites Fed. R. Crim. P. 35(a)(2), which states that a district court must correct a sentence, upon remand from a court of appeals for further sentencing proceedings, if it finds after those proceedings that the "original sentence" was incorrect. Even in this context, it is not clear that "original sentence" includes a "term of probation." A term of probation is granted at the discretion of the district court, and is not reviewable on appeal in most

---

(i.e., *currently* available) sentence. He does not seek to remove the meaning of "original" from § 3565(a).

contexts. Even when it is reviewable, its imposition is something a court of appeals, rather than a district court on remand, would determine to be "incorrect." If probation is deemed "incorrect," the appellate court will vacate the probation and remand the case for imposition of a sentence in accord with its findings under Rule 35(a)(1); there would seem no need for further district court proceedings under Rule 35(a)(2) – especially since a district judge can modify a term of probation without the need for a finding that the initial probation term was "incorrect." 18 U.S.C. § 3565(a).

B. Section 3565(a)'s Structure Supports the Court of Appeals' Analysis

1. Section 3565(a) involves a mandatory minimum penalty. It is not a typical mandatory minimum statute, however. Rather than selecting a precise minimum to impose, Congress set the mandatory penalty at one-third of an "original sentence" determined by someone other than Congress. If the purpose of a mandatory minimum statute is to limit judicial sentencing discretion, it is less likely that Congress based its standard on an "original sentence" (length of probation) chosen by the judges themselves, than on an "original sentence" (the guideline range) that Congress established to control those judges and eliminate sentencing disparities.

2. The Government itself concedes that construing the phrase "original sentence" as "sentence of probation" leads to an absurd result. So construed, § 3565(a) would require courts to revoke the sentence of probation and "sentence the defendant to not less than one-third of the original sentence of probation," reducing Mr. Granderson's 60 months of probation to 20 months of probation.

The Government seeks to avoid this dead end by arguing that "original sentence" refers only to the *length*, and not the *type*, of its "sentence." The Government identifies nothing in the structure or language of § 3565(a) to justify its choice of those attributes of a "sentence of probation" that it wishes to incorporate into the phrase "original sentence," and to discard those attributes less to its liking. Indeed, such selectivity

leads to an unnatural result. Under § 3565(a), courts must "sentence the defendant to not less than one-third of the original sentence." *The Government's construction causes the word "sentence" to mean "incarceration" in one place and "probation" just twelve words later.*[3]

Moreover, even the "length" of the Government's "original sentence" is unclear. A "fine" also is described in the 1984 Act as a "sentence" – in the same way probation is called a "sentence." 18 U.S.C. § 3551(b)(2). *See also id.* § 3551(b) & (c) ("A sentence to pay a fine"); *id.* § 3571(a) ("may be sentenced to pay a fine"); *id.* § 3572(d) ("A person sentenced to pay a fine"); *id.* § 3572(e) ("sentenced to pay a fine"); *id.* § 3574 ("a sentence to pay a fine"). If a person receives five years of probation with a fine payable over the first year, even the term of the sentence imposed is ambiguous. *See Gordon*, 961 F.2d at 426 ("Our conclusion that [calling probation a "sentence" was] semantic and not substantive is bolstered by the fact that the 1984 act also refers to the imposition of a 'sentence of fine.' We are confident that Congress did not intend to equate the paying of fines with imprisonment.").

2. There is no need for a "hybrid" interpretation of § 3565(a) that adopts the "length" but not the "type" of a "sentence of probation." Instead, "original sentence" is best read as a short-hand reference to the longer antecedent phrase "sentence that was available under subchapter A at the time of the initial sentencing," which appears in the immediately preceding sentence, in § 3565(a)(2).

As the Government itself explains, § 3565(a) provides that courts normally have wide discretion when a defendant violates probation. A court may continue or extend the defendant on probation, with or without changing its conditions. *Id.* § 3565(a)(1). Alternatively, a court may revoke the sentence of probation and impose "any other sentence that was

---

[3] The fact that "sentence" is used as a noun in one place and a verb in the other makes no difference. *See Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993).

available under subchapter A at the time of the initial sentencing." *Id.* § 3565(a)(2).

The final sentence of § 3565(a), however, which is introduced by the word "[n]otwithstanding," clarifies that courts do not have such discretion when a defendant possesses drugs on probation. Instead, the final sentence limits courts to the second and more restrictive of the two options set forth in the immediately preceding subsections: subsection (a)(2) – *i.e.*, a sentence "that was available under subchapter A at the time of the initial sentencing." The courts of appeals have consistently found that this phrase refers to the defendant's guideline range. *United States v. Boyd*, 961 F.2d 434, 438 (3d Cir.), *cert. denied*, 113 S. Ct. 233 (1992); *United States v. Alli*, 929 F.2d 995, 998 (4th Cir. 1991); *United States v. Williams*, 961 F.2d 1185, 1187 (5th Cir. 1992); *United States v. Von Washington*, 915 F.2d 390, 391 (8th Cir. 1990); *United States v. Dixon*, 952 F.2d 260, 261 (9th Cir. 1991); *United States v. Maltais*, 961 F.2d 1485, 1487 (10th Cir. 1992); *United States v. Smith*, 907 F.2d 133 (11th Cir. 1990). Finding the guidelines implicit in the sentences "available under Subchapter A" is consistent with *United States v. R.L.C.*, 112 S. Ct. 1329 (1992), in which this Court held, under the juvenile delinquency statute, 18 U.S.C. § 5037(c)(1)(B), that a sentencing court must apply corresponding adult guidelines, even when those guidelines are not expressly mentioned in the statute.

The Government argues that the word "notwithstanding" shows that "Congress meant the phrase 'original sentence' to have a meaning distinct from the phrase 'sentence that was available.' " Gov't Br. at 18. As explained by the Sixth Circuit, however:

> [The Government's argument] does violence to [a] basic principle of statutory construction. When interpreting the effect of a new law upon an old one, "[o]nly a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy." Without a clear expression of congressional intent to the contrary, we should try to reconcile, as much as possible, the anti-drug abuse amendment to the

> rest of Section 3565(a). . . . By interpreting "original sentence" to refer to the sentence of imprisonment that could have been imposed originally, less violence is done to Section 3565(a)(2). . . .

Clay, 982 F.2d at 963 (citations omitted).

The final sentence of § 3565(a) adds one further limitation on the courts' discretion: it requires a sentence that is "not less than one-third of the original sentence." It thus requires courts to impose a revocation sentence not less than one-third of the "sentence that was available under subchapter A at the time of the initial sentencing" – a defendant's established guideline range.

This construction is supported, not undermined as the Government suggests, by the language of § 3565(b). Subsection (b) provides that where a probationer possesses a firearm, the court "shall . . . revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing." 18 U.S.C. § 3565(b). This provision confirms that even resentences based on specific probation revocation statutes are to be based on sentences available under subchapter A.

The Government nevertheless argues that "[h]ad Congress intended the two [subsections] to have the same meaning, it is reasonable to suppose that Congress would have used the same language in each." Gov't Br. at 18. This argument loses its force when one examines the structure of §§ 3565(a) and (b). Having specified "the sentence that was available under subchapter A" in § 3565(a)(2), Congress could, in the sentence that immediately follows, reasonably use the phrase "original sentence" as a short-hand reference to this antecedent, and longer phrase. Subsection (b), by contrast, lacks such an antecedent; thus, Congress had no choice but to spell the concept out anew in that provision. This plausible explanation renders the Government's "assumption" of disparate meanings wholly inapplicable. *Cf. Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991).

C. Other Provisions' Language Confirms the Court of Appeals' Analysis

1. No similar conclusion can be reached in reviewing the language Congress could have used if it had wanted the Government's result. If Congress intended "original sentence" to mean "sentence of probation," it could have used that language. While the Government cites statutory references to "sentence of probation" in an effort to show that probation is a sentence, it ignores a more significant point: Congress plainly knew how to specify a "sentence of probation" when it wanted to do so, yet it did *not* do so in the critical portion of § 3565(a) here. The clear inference is that "original sentence" does not mean "sentence of probation."

2. Similarly, if Congress had meant for "original sentence" to refer to the sentence "imposed," Congress could have said that. Congress used similar language in numerous sections of the Code. *See* 18 U.S.C. § 3552(b) ("sentence to be imposed"); *id.* § 3553(a) ("particular sentence to be imposed"); *id.* § 3553(a)(2) ("sentence imposed"); *id.* § 3553(c) ("imposition of the particular sentence"); *id.* § 3557 ("sentence imposed"). It did not do so here.

3. Finally, if Congress had meant for "original sentence" to refer to the "term of probation," it could have said that. This language already had been used in other statutes nearby, *id.* § 3561(a) ("term of probation"); *id.* § 3564(a) ("term of probation"), and it would have tracked the "term of supervised release" language found in what the Government submits is the "parallel" provision of § 3583(g). Congress did not use that phrase here. The fact that these two provisions were passed side-by-side, and yet used such different language, led two lower courts to determine that § 3565(a) unambiguously must be resolved against the Government, without any need for the rule of lenity. *Gordon*, 961 F.2d at 431-32; *United States v. Roberson*, 805 F. Supp. 879, 880-82 (D. Kan. 1992), *aff'd*, 991 F.2d 627 (10th Cir. 1993).

The Government attempts to explain this lack of "parallel" language by claiming that the phrase "original sentence" would make no sense in a supervised release context, because

supervised release "is merely a 'part of' a sentence" rather than "a separate sentence in its own right." Gov't Br. at 27. Probation, however, also is often only "part of" of a sentence initially imposed, since the sentence imposed may include a fine. 18 U.S.C. § 3551(b). Moreover, the Government's analysis assumes that Congress started with the phrase "original sentence" in the probation statute, and then decided how to write the supervised release statute. This suggested order of drafting is guesswork.[4] It is just as reasonable to conclude that Congress did not want probationers to face one-third of their term of probation – especially since it used the phrase "term of probation" elsewhere.

4. Congress could have utilized several phrases used elsewhere to clarify § 3565(a). If "original sentence" was intended as a short-hand reference to one of these phrases, the most unwieldy provision needing a short-hand reference would appear to be the lengthy phrase contained in § 3565(a)(2) – rather than the short phrases that would have established the Government's meaning. As the Government conceded in its certiorari petition:

> To be sure, Congress did not make its meaning as clear in Section 3565(a) as it did in Section 3583(g); Section 3565(a) would have been clearer if Congress had not simply referred to "one third of the original sentence" but had referred instead to "one third of the original sentence of probation."

Gov't Pet. at 12. *Cf. United States v. Bass*, 404 U.S. 336, 347 (1971) (rule of lenity applied where Government certiorari petition "concedes that 'the statute is not a model of logic or clarity.' ").

---

[4] Even assuming the Government's suggested drafting order, the Government still fails to explain why Congress would not have used a phrase such as "original term" in § 3583(g), which would have tracked the "original sentence" language in § 3565(a), if parallel treatment had been desired.

III. Section 3565(a)'s Context Unambiguously Supports the Court of Appeals' Analysis

The context in which § 3565(a) was passed further undermines the Government's view. The so-called "parallel" supervised release provision passed beside it, 1988 Act § 7303(b), *codified at* 18 U.S.C. § 3583(g), as well as the parole provision passed alongside the supervised release provision, 1988 Act § 7303(c), *codified at* 18 U.S.C. § 4214(f), reveal that the Government's interpretation of § 3565(a) cannot be what Congress intended.

A. The Supervised Release Revocation Subsection of § 7303

The Government claims that Congress "obviously viewed" § 3565(a)'s probation and § 3583(g)'s supervised release revocation provisions "as parallel and closely related." Gov't Br. at 26. The Government states that it is "reasonable to construe them *in pari materia* to call for parallel treatment of drug offenders who are under non-custodial supervision." *Id.* at 26-27.

1. Any intended "parallel" treatment for those on probation and supervised release is not evident from the statutes. The language in the two provisions certainly is not "parallel":

[I]f a defendant is found by the court to be in possession of a controlled substance . . . the court shall revoke the sentence of the probation and sentence the defendant to not less than one-third of the original sentence.	If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of the supervised release and require the defendant to serve *in prison* not less than one-third of the *term of supervised release*.
18 U.S.C. § 3565(a).	18 U.S.C. § 3583(g) (emphasis added).

2. There are reasons for these distinctions. Supervised release is very different than probation. Supervised release

is imposed only on defendants who have actually been incarcerated. *Id.* § 3583(a). Probation, by contrast, is an alternative to incarceration. *Id.* § 3551(b). Persons on supervised release include serious offenders, such as Class A and Class B felons. *Id.* § 3583(b). Probation, by contrast, is not even statutorily available to such offenders. *Id.* § 3561(a)(1). In fact, probation is not available if the defendant receives any imprisonment, even for an unrelated offense. *Id.* § 3561(a)(3). Even if statutorily authorized, probation is available only to persons whose sentencing guidelines fit within Zone A or B of the Sentencing Table. U.S.S.G. § 5C1.1. Even where probation is authorized by the guidelines, it is received only when a judge exercises discretion to grant it.

It was rational for Congress to treat more harshly those who violate supervised release than those who violate probation. A person violating supervised release is necessarily a person who has not complied even after experiencing jail. A person on probation, by contrast, likely has never been to jail, and may not need any lengthy imprisonment upon revocation. To a defendant on probation from a Hobbs Act conviction, 60 days in jail will seem an eternity.

Supervised release provisions also contemplate the conversion of supervised release terms into imprisonment. The supervised release statute gradates the term's length based on the seriousness of the offense involved. *Id.* § 3583(b). It also specifically limits the imprisonment available for revocations of supervised release based on the class of felony involved. *Id.* § 3583(e)(3).

The probation statutes, by contrast, do not gradate the term of probation based on the type of felony involved. Probation terms as long as five years are available even for misdemeanors. No specific statutory limits are placed on the terms of imprisonment available upon revocation, since the resentence is to be determined by reference back to the "sentence that was available under subchapter A at the time of the initial sentencing".

The Sixth Circuit noted "[t]he inherent differences between supervised release and probation." *United States v. Stephenson*, 928 F.2d 728, 730 (6th Cir. 1991):

> In probation, because the defendant will not have served time for his offense, the court may consider the guidelines range of the original offense as the possible incarceration period. In supervised release, however, the individual will have already served time, possibly the maximum allowed under the Guidelines. . . . The possibility of reincarceration for violation of a condition of supervised release is a cornerstone of the sentencing structure.

Id. at 730-31 (supervised release revocation penalties may exceed those for probation violations). *See Granderson*, 969 F.2d at 984.

3. These distinctions explain why Congress used such different language in §§ 3565(a) and 3583(g).

a. Under § 3583(g), drug possession on supervised release requires the defendant to serve the resentence "in prison." This language is conspicuously absent from the probation statute, § 3565(a). This distinction mirrors the *general* revocation language for supervised release and probation:

[The court may] revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.	[The court may] revoke a term of supervised release and require the person to serve *in prison* all or part *of the term of supervised release* without credit for time previously served on postrelease supervision. . . .
18 U.S.C. § 3565(a)(2).	18 U.S.C. § 3583(e)(3) (emphasis added).

Supervised release revocations *always* vary from probation revocations. Supervised release revocations involve imprisonment, the length of which is determined by referencing the "term of supervised release." With probation, by contrast, revocation does not necessarily involve imprisonment, and the resentence is not based on the length of probation, but on the sentence "available under subchapter A at the time of the initial sentencing."

It is quite "natural" that the mandatory revocation provisions for drug possession would track these important distinctions in the general revocation statutes. The fact that the phrase "in prison" is included in § 3583(g) and absent from § 3565(a) – a point ignored by the Solicitor General – undermines the Government's claim that, following probation revocation for drug possession, there is "no doubt" imprisonment must be ordered in its stead. Gov't Br. at 14. The doctrine of *inclusio unius est exclusio alterius*, at the very least, casts substantial "doubt" on this conclusion.[5]

Within Mr. Granderson's 0-6 month range, numerous sentences other than incarceration were "available . . . at the time of the initial sentencing." The Court, after revocation under (a)(2), remains free to impose restrictions on liberty less confining than actual incarceration, such as community confinement, inpatient drug treatment, and home confinement. *See* U.S.S.G. § 5C1.1(c)(2). The fact that the Government's reading of § 3565(a) would "make no sense at all" without an implied incarceration term, Gov't Br. at 15, does not call for this Court to infer it – particularly given § 3565(a)'s conspicuous failure to include the words "in prison." It calls instead for rejection of the Government's view as not unambiguously flowing from a natural reading of the statute.

---

[5] The Government argues that "every court of appeals that has addressed the issue acknowledge[s] that the mandatory revocation provision of Section 3565(a) requires the imposition of some term of imprisonment." Again, the Government ignores an important point – that the issue of whether imprisonment (as opposed to less restrictive confinement) must be imposed under § 3565(a) was not raised in any of these cases except the instant case, in which the court of appeals did not address the issue. 969 F.2d at 981 n.1. *See* 92-8824 Cross-Pet. Reply at 4 note 2. No precedent can be gleaned from judicial silence. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984); *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37-38 (1952); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) ("The glory of the Anglo-American system of adjudication is that general principles are to be tested in the crucible of concrete controversies.").

b. The differences between probation and supervised release also explain why Congress used "original sentence" rather than "term of probation" in § 3565(a). This is not "slightly different language" in the statutes, Gov't Br. at 27; rather, notable differences exist in very short statutes passed side-by-side. If Congress wanted parallel treatment, it would have used more parallel language than was used here.

4. In addition, the Government's reading of §§ 3565(a) and 3583(g) does not lead to "parallel" treatment. Instead, it causes an anomalous result in which probationers are treated more harshly for the same violation than defendants on supervised release.

As noted, supervised release terms are specifically graded by offense type. The maximum term is one year for misdemeanors and Class E felonies, and three years for Class C and D felonies. Five-year terms of supervised release are not even available except for Class A and B felonies – crimes so serious that they cannot even yield probation. 18 U.S.C. § 3583(b). No such gradations exist for probation. Probation terms as long as five years are available even for misdemeanors. *Id.* § 3561(b).

The Government's interpretation of § 3565(a) means that, for the same violation, the least culpable persons (probationers) often will be treated more harshly than the most culpable (those who needed prison and supervised release). Under the Government's view, drug possession causes those with 5-year terms of probation – even misdemeanants – to face 20 months in prison. On the other hand, those same misdemeanants could only have received a maximum of one year of supervised release. Thus, a misdemeanant who possessed drugs while under the maximum one year of supervised release would face a mandatory jail term of four months – *five times less* than his less culpable, probationary counterpart. The disparity in maximum revocation sentences is even greater, since unlike probation, statutory limits exist on resentences following revocations of supervised release. *Id.* § 3583(e)(3).

If Mr. Granderson had been a less admirable person, and had received the top of his guideline range (6 months), he

could have received no more than three years of supervised release to follow. If he then possessed drugs, his mandatory minimum would have been one-third of 3 years – 12 months, for a total of 18 months – two months less than the 20-month minimum suggested by the Government, and *eight months less punishment for the same violation*. The Government's view does not give Mr. Granderson parallel treatment to an equal counterpart on supervised release. He faces higher penalties for the same violation than a more culpable counterpart.

In sum, §§ 3565(a) and 3583(g) do not "call for parallel treatment." Nothing in the statutory language or legislative history says they are parallel. There are good reasons why Congress would not have wanted them parallel. Finally, the Government's interpretation is not parallel. This Court should not presume that the linguistic differences in these short statutes was accidental. *Cf. Liparota v. United States*, 471 U.S. 419, 430 (1985) (Congress' intent "not immediately obvious"; "there are no doubt policy arguments on both sides"); *Bifulco v. United States*, 447 U.S. 381, 395 (1980) ("Congress' [omission], alleged by the Government to have been inadvertent, may have been intentional.").

B. The Parole Revocation Subsection of § 7303

The Government's view of § 3565(a) is further undermined by the revocation section for drug possession on *parole*, similarly included in the same section of the 1988 Act as § 3565(a):

> Notwithstanding any other provision of this section, a parolee who is found by the Commission to be in possession of a controlled substance shall have his parole revoked.

1988 Act § 7303(c), *codified at* 18 U.S.C. § 4214(f). The Government ignores this section in its *in pari materia* analysis of § 7303's so-called "parallel" provisions.

While parole must be revoked for drug possession, no mandatory revocation penalty is specified. The likely reason

is that parole revocation guidelines already existed. *See Albernaz v. United States*, 450 U.S. 333, 341 (1981) ("it is appropriate for [this Court] 'to assume that our elected representatives . . . know the law.' ") (citations omitted). *See also* S. Rep. 98-225, *supra* (extensive discussion of parole guidelines).

The parole revocation guidelines reveal that Mr. Granderson's analysis of § 3565(a) is the more natural view. The parole guidelines consistently rate "simple possession" of drugs as a "Category One" violation. 28 C.F.R. § 2.20, at ¶ 902 (heroin); ¶ 912 (marijuana and hashish); ¶ 922 (cocaine offenses); ¶ 932 (other illicit drug offenses) (July 1, 1988). This yields the following revocation ranges, depending on the parolee's salient factor score:

OFFENDER CHARACTERISTICS: PAROLE PROGNOSIS (SALIENT FACTOR SCORE 1981)

Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
<=4 months	<=8 months	8-12 months	12-16 months

28 C.F.R. § 2.20. These are the revocation ranges for persons possessing drugs while on parole – for persons who went to jail and still possessed drugs after their release on parole.

The Government's interpretation of § 3565(a) would yield a *minimum* sentence for probationers possessing drugs that is higher than the *maximum* presumptive sentence for parolees possessing drugs who have the *very worst* criminal records. This is the same odd disparity as that noted above in the supervised release context.

It is unlikely that Congress passed a law in which drug possession by the least culpable persons (those who received probation, even under the guidelines) often leads to minimum penalties that are harsher than the maximum presumptive penalties for the most culpable persons (those who had been sentenced to prison and later released under parole or supervised release – even the worst of these offenders). Indeed, the Government's view would cause Mr. Granderson to face a

minimum revocation sentence, for possessing drugs on probation, that is eight months higher than the *maximum* he could have faced if he had been *convicted* of possessing the same drugs *in prison*. 18 U.S.C. § 1791(a)(2).

Congress' reliance on the parole revocation ranges is consistent with its similar reliance on sentencing guideline ranges as the one-third standard from which to derive probation revocation penalties. Because most probationers would be equivalent to parolees with good salient factor scores of 6-10, who would face similar parole revocation ranges of *0-4* or *0-8* months, the statutory context strongly favors the court of appeals' interpretation. This is especially true since ranges for drug possession under the Sentencing Commission's new revocation guidelines also fall into this spectrum of seriousness. *See* U.S.S.G. § 7B1.4 (eff. Nov. 1, 1991) (Grade C offense ranges from 3-9 to 8-14 months). *See also* 28 U.S.C. § 994(a)(3) (1984 Act authorizes Commission to promulgate revocation guidelines).

IV. The Possible Applications of the Statute Favor the Court of Appeals' Analysis

A. Technical Application: Guideline Ranges Work Better Than Probation Terms

1. The fact that Congress apparently was comfortable with a "range" in a parole context also undermines the Government's claim that it is somehow "awkward" for "original sentence" to refer to a defendant's guidelines range. The use of a range is not awkward or even unusual. On other occasions, Congress has specifically referred to sentencing guideline ranges as "sentences." 18 U.S.C. § 3742 (allowing appeals if sentence imposed is higher or lower than "the sentence specified in the applicable guideline range").[6]

---

[6] To paraphrase the Government, Congress' reference to guideline ranges as "sentences" similarly "make[s] clear that Congress did not mean to exclude the guideline range sentence when it referred to the defendant's 'original sentence' in connection with the drug-possession revocation provision in Section 3565(a)." Gov't Br. at 12-13.

The language chosen by Congress was not "awkward" but a natural understanding that Mr. Granderson's "original sentence" meant his guidelines range. Indeed, such a reading is essential. A district court could not declare a sentencing range to be "incorrect" on remand under Fed. R. Crim. P. 35(a)(2) unless the phrase "original sentence" in that rule is interpreted to mean, or at least include, a defendant's guidelines range.

2. By implication, the Government is attempting to suggest that, by avoiding a range, it presents a more stable option. A term of probation, however, is not static. A "court may modify, reduce, or enlarge the conditions of a sentence of probation at any time" prior to its expiration. 18 U.S.C. § 3563(c).

Suppose three first offenders are given 3-year terms of probation. Defendant A does well, and his probation is reduced to a 1-year term. Defendant B fails to submit monthly reports, and her probation is extended to five years. Defendant C is arrested for a new offense, and while probation is not extended, it is modified to include six months of confinement in a halfway house.

If each of these defendants then possesses a controlled substance, what is the Government's "original sentence"? Use of the initial 3-year terms of probation would yield identical 1-year sentences for each (since it exceeds their 3-9 month revocation guidelines, U.S.S.G. § 7B1.4), despite different culpability levels. Use of the term of probation in effect at the time of revocation would fare no better. Even if this were an acceptable reading of the word "original," Defendant C, the worst offender, would receive a lower mandatory minimum than Defendant B.[7] This difficulty reveals the problem in

---

[7] This scenario is not limited to modifications. Suppose Defendant D initially receives five years of probation, while Defendant E, a much riskier person, receives an actual restriction on liberty – 6 months in a halfway house – as part of a 3-year probation term. If both possess drugs on probation, the Government would impose a far higher mandatory minimum on the less culpable Defendant D (20 months) than on Defendant E (12 months).

adopting only the length, and not the type, of what the Government calls the "original sentence."

The sheer "length" of a probation term is perhaps the *worst* barometer Congress could have chosen as a standard for revocation punishment. Judges often struggle far less, in deciding whether to give a 5-year or 4-year term of probation, than they do in deciding whether to add a single week in a halfway house as a condition of that probation. This Court itself has noted that probation and incarceration are not interchangeable or even analytically comparable. *See Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989) ("imprisonment is an 'intrinsically different' form of punishment" than probation) (citations omitted). *Compare Frank v. United States*, 395 U.S. 147, 152 (1969) (actual *imposition* of three years' probation not onerous enough to require jury trial) *with Baldwin v. New York*, 399 U.S. 66, 69 n.6 (1970) (mere *potential* sentence of incarceration in excess of six months requires jury trial). "[P]robation and incarceration are like the proverbial apples and oranges." *Gordon*, 961 F.2d at 432. It cannot be assumed that Congress based the length of a prison term, which is meant to punish the offender, on the length of a defendant's term of probation, which is meant to serve the purpose of rehabilitation. *Id.* at 433 ("legal alchemy to transform three years probation into one year imprisonment"). The Government's view causes a probationer who successfully completes 4½ years of a 5-year probation term to face a mandatory revocation sentence 8 months higher than one who cannot complete a week of a 3-year term.

In contrast to the constantly changeable length and conditions of probation, the established guideline range remains constant. This range is not something that a court will or can "modify, reduce or enlarge" at a later date. It was, and remains, the constant "origin" of the "sentence."

3. The Government nevertheless criticizes lower courts' use of the top of the range as the standard from which the one-third sentence is to be estimated. The fact that these courts do not adopt a more lenient "one-third" standard does not mean that they "disregard the logic of their own statutory analysis." Gov't Br. at 21. Rather, it means only that the

Government errs in its later claim that these courts are reluctant to impose harsh sentences.

The lower courts use the top of the range because one-third of the "original sentence" means one-third of "any other sentence that was available under subchapter A." If a person agreed to buy "any other inventory that was available," that person likely would mean the maximum amount. By using the top of the range, the one-third minimum varies based on the seriousness of the offense and the characteristics of the offender. Surely this is a more "logical" view than the Government's, which arbitrarily links the minimum to a probation term designed to rehabilitate.

4. What would be harder to imagine is the analysis suggested by the Government. The 1988 Act mandates probation revocation both for drug possession, § 3565(a), and for gun possession, § 3565(b). The Government's view is that, if Mr. Granderson had illegally possessed guns on probation, he faced revocation but no minimum sentence, but because he tested positive for drugs, he must serve at least 20 months in jail. Nothing suggests that Congress wanted this vast disparity, particularly given the corresponding crimes for such offenses. *Compare* 18 U.S.C. §§ 922(g) & 924(a)(2) (10-year felony for Mr. Granderson to possess a firearm) *with* 21 U.S.C. § 844 (drug possession usually a misdemeanor). While probationers possessing drugs might face slightly higher penalties than those possessing guns, due to § 3565(a)'s minimum "one-third" language, the disparity is not the huge difference the Government suggests.

B. Practical Application: Congress Did Not Mean What the Government Claims

1. The Government's suggested application creates profound problems in § 3565(a)'s application. Because five-year probation terms are permitted for misdemeanants, the Government's interpretation causes such persons to spend 20 months in jail if drugs are possessed on probation – *more than the statutory maximum* for misdemeanors. 18 U.S.C.

§ 3581(b).[8] *See also McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (rejecting due process challenge to "preponderance" standard of proof on sentencing enhancement, but only because enhancement did not alter statutory maximum that already existed). This Court should read § 3565(a) in a manner that avoids these statutory and constitutional concerns.

2. Numerous other statutory disparities exist, with similarly illogical results. *See, e.g., Clay*, 982 F.2d at 962-63 (explaining how the top of Ms. Clay's guideline range, even if combined with a separate conviction for simple possession, would yield a maximum combined sentence less than the Government's suggested minimum sentence for a mere revocation; exposure more than doubles). The Government's interpretation, in other words, is "likely to lead to curious consequences. . . . Yet there is not a shred of evidence to suggest that this is what Congress intended." *Busic v. United States*, 446 U.S. 398, 407 (1980).

3. The Government's view is even more disturbing when the Sentencing Commission's revocation guidelines are considered. The Commission typically has been careful in writing guidelines to track mandatory minimums. *See, e.g.*, U.S.S.G. § 2D1.1 Background (guideline base offense levels "proportional to the levels established by statute"). With probation violations, however, being "in possession" of a controlled substance, without more, is a "Grade C" violation. *See id.* § 7B1.1(a)(1) & Application Note 3 (cross-referencing *id.* § 4B1.2(2); "controlled substance offense" does not include simple possession). Because Mr. Granderson had a Criminal History Category of I, his revocation guideline range would be only 3-9 months. *Id.* § 7B1.4.

---

[8] The Government in its certiorari petition attempted to confuse this problem. Gov't Pet. at 8 note 3 (claiming that "[i]n some cases – frequently cases involving misdemeanors," the guidelines limit probation terms to 3 years). The guidelines do not tie maximum probation terms to whether an offense is a felony or misdemeanor. The terms instead are tied to the offense level. U.S.S.G. § 5B1.2. The guidelines allow 5-year probation terms for anyone, including misdemeanants, with offense levels of 6 or more.

In fact, Mr. Granderson's range under the revocation table if he had *manufactured or distributed* controlled substances would have been only 12-18 months. *Id.* § 7B1.4. The Government's view of § 3565(a) would cause Mr. Granderson, who merely possessed drugs while on probation, to face a *minimum* revocation sentence that is higher than the presumptive *maximum* he would face for manufacturing or distributing those drugs on probation. Even without statutory ambiguity, the Government's view of § 3565(a) would "produce a result so absurd or glaringly unjust as to raise a serious doubt about Congress's intent," *Chapman v. United States*, 111 S. Ct. 1919, 1926 (1991), independently justifying the use of lenity.

4. The Government's view also would eliminate courts' ability to cure such disparities. If Mr. Granderson initially had been given 20 months in jail, he could have appealed that sentence, 18 U.S.C. § 3742(a)(3), even if the increased sentence was based on his possession of controlled substances on bond. Indeed, if he demonstrated drug rehabilitation, he might have appealed the denial of a downward adjustment on that ground. *See United States v. Harrington*, 947 F.2d 956, 962-63 (D.C. Cir. 1991).

No similar review would be possible under the Government's view of § 3565(a). Even though Mr. Granderson's sentence would be nearly 3½ times his applicable guideline range, it would be based on a probationary term he was never able to appeal, since his term of probation was imposed within his applicable guidelines. U.S.S.G. § 5B1.2(a)(1). The Government's view thus "would frustrate one of the prime objectives Congress had in view when it established the Commission and directed it to develop the guidelines," *Harrington*, 947 F.2d at 960, namely, "avoiding unwarranted sentencing disparities." 28 U.S.C. § 991(b)(1)(B).

5. The Government disputes this point. It claims for the first time that Mr. Granderson's probationary term was not imposed within his applicable guideline range. Gov't Br. at 16. This interpretation is incorrect. The Government does not explain what "zero" in Mr. Granderson's 0-6 month range means if it is not permission to grant probation. The Sentencing Commission confirms that probation is authorized within

a 0-6 month range. *See* U.S.S.G. Ch. 5 Introductory Commentary ("A sentence is within the guidelines if it complies with each applicable section of this subchapter"); *id.* § 5C1.1(a) ("A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.").

Indeed, accepting the Government's analysis would give the Government an unwarranted right to appeal every term of probation that is ever imposed, by claiming that a district court's grant of probation represents a failure to sentence the defendant within the applicable guideline range. 18 U.S.C. § 3742(b). This is not the law; the lower court stayed within the range in imposing Mr. Granderson's term of probation.[9]

6. "Original sentence" is a short-hand reference to the immediately preceding language in § 3565(a)(2). This is less "weight to bear" than the Government's view of one-third of the original sentence, as meaning "in prison, for one-third as long as the length of the probation term, not the length of the fine-payment term, initially imposed, disregarding whatever

---

[9] Even where a district court does depart, the proper procedure is for the court to move from the applicable range *to* another range, which is then *adopted* as the established guideline range. A sentence is then imposed within this established range. *See, e.g., United States v. Adudu*, 993 F.2d 821, 823 n.1 (11th Cir. 1993); *United States v. St. Julian*, 922 F.2d 563, 570 (10th Cir. 1990); *United States v. Ferra*, 900 F.2d 1057, 1061 & 1064 (7th Cir. 1990); *United States v. Kim*, 896 F.2d 678, 685 (2d Cir. 1990); *United States v. Munna*, 871 F.2d 515 (5th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990). This Court, in *Williams v. United States*, 112 S. Ct. 1112 (1992), explained how a sentencing court, after finding a defendant's criminal history category inadequate:

> looked to the next highest criminal history category, for which the guideline range was 21 to 27 months. The court then sentenced Williams to 27 months' imprisonment and explained that it was selecting a sentence at the high end of the [new] guideline range. . . .

Id. at 1117 (citations omitted). "Original sentence" refers not to "rejected" ranges, Gov't Br. at 19, but to the guideline range established for defendants after departures are taken into account.

restrictive conditions might have been placed on that probation and affected its length, and even if that term of probation has since been modified and the initial probation length no longer even exists."

C. The Government's Optional "Plain" Meaning

Recognizing its problems, the Government argues what is, in essence, a fall-back position: that "if 'original sentence' really means 'maximum available sentence,' . . . the appropriate benchmark for purposes of § 3565(a) should be the maximum sentence authorized by law for the defendant's crime." Gov't Br. at 22.

The Government's decision to posit optional "plain" meanings of § 3565(a) implicitly concedes its ambiguity. Moreover, the Government's fall-back position should be rejected on its merits. Use of the statutory maximum as the benchmark does not flow from the statute's "plain" meaning. Although eight courts of appeals have now examined this issue, not one has even suggested the statutory maximum as a possible meaning of "original sentence," much less the "plain" one. In this case, the Government not only failed to argue this below, but also conceded just the opposite:

> [The Government's view] appears to expose Granderson to a possible sentence of sixty months incarceration. At oral argument, *the government disputed this interpretation* and contended that the minimum term of incarceration [for revocation under § 3565(a)] was also a maximum sentence [because its proposed 20 month minimum exceeded Mr. Granderson's revocation guidelines].

Granderson, 969 F.2d at 984 n.4 (emphasis added). Only after the court of appeals noted that this concession "points out another difficulty with the government's reading of the provision," *id.*, did the Government change its argument before this Court. *Cf. Evans*, 112 S. Ct. at 1891 ("The complete absence of support for the dissent's thesis presumably explains why it was not advanced by petitioner in the District Court or the Court of Appeals.").

Use of the statutory maximum also yields even more irrational disparities than the Government's previous "plain" meaning. Class C felonies, which may give rise to probation, 18 U.S.C. § 3561(a), carry up to 25 years in prison. *Id.* § 3559(a)(3). The Government's fall-back view would subject a Class C felon, who had a single drug relapse on probation (regardless of the type or quantity of drug), to a minimum of 8⅓ years in jail – more than eight times the statutory maximum for a drug possession conviction, far more than the sentences for many drug distribution convictions, and more than any presumptive revocation sentence for any offense (including murder) under the revocation guidelines. U.S.S.G. § 7B1.4. It also would require imposition of a $ 83,333.33 fine. It cannot be said that this is what Congress "plainly" intended.

V. The Legislative History of § 3565(a) Supports the Court of Appeals' Analysis

The Government thus seeks refuge in the legislative history. Despite claiming a silent record on § 3565(a), the Government boldly states that "there is no doubt that the Members of Congress who voted for the 1988 Act did so with the full understanding and intention that it would provide harsh medicine for persons who chose to use or possess illegal drugs." Gov't Br. at 24-25.

Legislative history, even when in the Government's favor, should not be allowed to cure ambiguity arising from a statute's language, context and application. *R.L.C.*, 112 S. Ct. at 1340 (Scalia, J., concurring). *Cf. id.* at 1338 n.6 (majority opinion; issue "not raised and need not be reached in this case"). Even if it can, § 3565(a)'s legislative history shows that Congress did not prescribe any medicine as "harsh" as the Government suggests here.

A. The Legislative History of the 1988 Act Reveals a "Measured" Approach

1. The amendment's lack of clarity has roots in its hurried consideration. On October 19, 1988, two days before it passed, the bill had not been printed and was "not there to be distributed and shown." 134 Cong. Rec. at S16803 (Sen. Moynihan). The bill was "very, very complex." *Id.* at S16939 (Sen. Pryor). Its provisions ranged from alcohol warning labels to child pornography. It was the last item voted upon before adjournment for the "few weeks remaining before election day." *Id.* at H11245 (Rep. Lent).

When the final version reached the floor, Rep. Kastenmeier stated, "I must in all candor . . . note that the process we have adopted to take up this bill is not an example of Congress at its best. . . . [W]e need to adopt a more rational and deliberative process." *Id.* at H11247. As noted by Rep. Conte:

> Mr. Speaker, I want everyone to take note. Here we are facing a document that looks more like a telephone book than a piece of legislation. It is the last day of the session. And it is not a continuing resolution.
>
> The Appropriations Committee did its work. We got our bills done. And yet here we are 2 weeks late, trying to pass a bill that contains Lord only knows what.

Id. at H11245. The House, which had never seen any version of § 7303 before the bill returned from Conference, began its first and last debate shortly before 12:30 a.m. on October 22, 1988. *Compare id.* at H11108 (start of House debate) with *id.* at H11110 (noting time as 0030). Later that night, Senator Dole, who essentially began Senate debate on the bill's final version, was "cognizant that it is 2:20 in the morning" and promised "not to take long." *Id.* at S17303. *Cf. Busic*, 446 U.S. at 405; *Bass*, 404 U.S. at 343-44 (rule of lenity applied where laws passed with little discussion, no hearings and no report).

2. The Government claims that other provisions of the Act prove Congress must have intended to maximize § 3565(a)'s penalty. *Cf. Busic*, 446 U.S. at 409 (criticizing "stark and unidimensional quality of any calculus which attempts to construe the statute on the basis of an assumption that . . . Congress' sole objective was to increase the penalties . . . to the maximum extent possible"). When these provisions are examined, however, the Government's draconian view of § 3565(a) seems out of line with the legislative history.

a. The Government cites § 6480 of the 1988 Act and claims that it contains "enhanced penalties for simple possession." Gov't Br. at 24. The Government does not describe these "enhanced penalties." The reason is that § 6480's change was moderate – elimination of the special low caps on maximum fines. Congress did not increase the mandatory minimum penalty of a $1000 fine for first convictions, or the mandatory minimum penalty of 15 days in jail and a $2500 fine for repeat convictions.[10]

The penalties for drug possession after the 1988 Act are consistent with the court of appeals' interpretation of § 3565(a), in which Mr. Granderson faces a minimum of 60 days in jail – four times more than 21 U.S.C. § 844's minimum for *repeat* offenders – without even being convicted of drug possession. They are not in line with the Government's minimum sentence of *more than 40 times* that penalty.

---

[10] Even while eliminating the maximum fines, the 1988 Act enacted a new, *reduced* alternative for persons possessing a "personal use amount" of drugs: civil penalties in lieu of criminal prosecution. 1988 Act § 6485; *see also id.* § 6486(b) (factors in decision "whether to assess a civil penalty under this section *or* to prosecute the individual criminally") (emphasis added). Under this civil penalty, a possessor may avoid even the mandatory criminal fines. *Id.* § 6486(f) (Government has unlimited right to compromise, modify or remit claims). The civil defendant retains various procedural protections. *Id.* § 6486(g). Unless the user has a previous drug conviction, this civil alternative can even be utilized *twice*. *Id.* § 6486(c) & (d). Even expungement of records is possible if the user follows certain conditions. *Id.* § 6486(j). 102 Stat. 4384-86.

b. The Government also claims that the 1988 Act mandated that "*persons who possess* illegal drugs *are to be denied* federal benefits," and that "public housing tenants who engage in illegal drug-related activity *will have their tenancies terminated*," Gov't Br. at 23 (emphasis added). These statements are incorrect. The loss of federal benefits is not automatic, universal or certain.

The Act states only that those *convicted* of drug possession, at the *discretion of the court*, may be denied such benefits. 1988 Act § 5301(b)(1)(A). Even for drug *traffickers*, and those with a *second or subsequent conviction* of drug possession, loss of federal benefits remains discretionary. *Id.* § 5301(a)(1)(A) & (B); § 5301(b)(1)(B). Only after a *third trafficking* conviction are benefits automatically withheld. *Id.* § 5301(a)(1)(C). 102 Stat. 4310-11. Even then, many federal benefits are exempt. *Id.* § 5301(d)(1)(B), 102 Stat. 4311 ("Federal benefit" "does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit . . . "). Public housing sanctions similarly provide only that drug-related criminal activity is "cause for termination of tenancy." *Id.* § 5101, 102 Stat. 4300. Finally, even non-exempt, withheld benefits are restored if the possessor agrees to long-term treatment, or is rehabilitated. *Id.* § 5301(b)(2), 102 Stat. 4311. Rather than harsh medicine, "the compromise reached by the House and Senate takes a cautious approach toward user accountability and will allow us time to study the effect of this policy." *Id.* at H11243 (Rep. Jeffords, ranking Republican on Education and Labor Committee).

c. The Government also claims that the Act requires federal contractors and grant recipients to maintain drug-free workplaces and discipline employees using drugs. Gov't Br. at 23. This argument ignores the amendment's background. The 1988 Act actually overruled the Administration's "zero tolerance" policy that was already in place. Under that policy, the Customs Service had tried to force commercial fishing groups to sign agreements requiring owners to search vessels before departure, drug-test employees, and sign a written "zero tolerance" goal. One legislator noted these "excessive

efforts by those involved in the drug war that we are correcting in this bill." *Id.* at H11242 (Rep. Young).

> However, with the extremely high level of controversy which has surrounded the administration's zero tolerance policy we have lost the support of a significant portion of the population who also question its effectiveness and fairness. Let's face it, that's why we are enacting these provisions today because, in the minds of the public, this is Government policy gone awry. It symbolizes unfairness. . . .

Id. at H11268 (Rep. Davis). *See also id.* at S17303 (Sen. Dole) (lamenting "retreat in the successful zero tolerance program").

d. The Government also cites to increased penalties for crack cocaine possession. Even these increases, however, were only for "*Serious* Crack Possession Offenses." 1988 Act Title VI Subtitle L (emphasis added). Below specified quantities, physical possession of even crack cocaine remains a misdemeanor. 21 U.S.C. § 844.

e. The Government also cites to other increased penalties in the 1988 Act. Gov't Br. at 24. With one possible exception,[11] none of these provisions increased penalties for simple possession; simple possession of drugs even near a school continues to be a misdemeanor.

4. Legislators did not want to overreact. Senator Dodd stated, "It is important that we maintain the strongest public support for our efforts in our war against drugs, and we

---

[11] The one exception is 1988 Act § 6468, 102 Stat. 4376, which apparently increased the maximum (but not any minimum) penalty for possessing *narcotic* drugs, such as heroin, in prison. The new sentencing guidelines Congress ordered the Sentencing Commission to create for such offenses specifically excluded possession. 1988 Act § 6468(c) (guidelines apply only to "a defendant convicted of violating section 1791(a)(1) of title 18"; simple possession provision is (a)(2)). A defendant *convicted* of possessing in jail non-narcotic drugs – such as the type in Mr. Granderson's system here – still faces a maximum penalty of one year in jail and no mandatory minimum. 18 U.S.C. § 1791(b)(4).

undermine that support with overly broad penalties that are potentially unfair and inconsistent in their application." 134 Cong. Rec. at S16916-17. Other supporters concurred. *Id.* at H11218 (Rep. Rangel) (rejecting idea that "we will win the war against drugs by waging it against millions of our citizens"); *id.* at H11229-30 (Rep. Vento) ("We cannot legislate away drug abuse. We must put in place a good and fair policy which is based on common sense.").

Members of Congress were justifiably concerned about fair treatment for users. User penalties affected their constituents and constituents' families. As noted by Senator D'Amato, "1 in 8 Americans over age 12 – 23 million people – use illegal drugs regularly." *Id.* at S17318. Some suggested that the numbers might be higher. *See id.* at S17306 (Sen. Rockefeller) ("As many as 37 million Americans used drugs in 1987. That's 16 percent of our population."). Senator Dole essentially described Mr. Granderson: "The 23 million Americans who use drugs are not a part of the 'counterculture' or 'underclass.' Most of them work, pay taxes, and vote. They are our friends and neighbors." *Id.* at S17324.

5. The Government cites to comments made by certain legislators. Immediately after the end of the Government's quote from Senator Dole, however, he states: "But we recognize that our courts and prisons are seriously overcrowded and cannot bear the burden of processing these new criminal cases." *Id.* at S17303. Dole then notes the Act's "double-edged weapon" against possessors: civil fines and the fact that those convicted of possession "could" be denied federal benefits. *Id.* These are the same "price[s] to pay" identified by Rep. McCollum. *Id.* at H11239. Congress' emphasis on non-incarceration penalties and judicial discretion undermines the Government's claim that Congress surely limited judges' options to heavy jail terms under § 3565(a).

Furthermore, in thanking Senator Domenici, Senator Dole summarized the user accountability sanctions *not* as "harsh medicine," but rather in the following manner:

> The user accountability provisions establish a system of penalties for the users of [drugs] *based on the principle of "measured response."* Senator

> Domenici coined the phrase "measured response," which means that *the penalty for drug use should be proportionate to the seriousness of the offense, consistent with American standards of freedom and justice.*

Id. at S17324 (Sen. Dole) (emphasis added). Rather than having "no doubt" about voting for harsh medicine, "some Senators will say that this bill does not threaten the user with a big enough stick to reduce demand. . . . Others will say that we must do more in terms of rehabilitation and education." *Id.* at S17318 (Sen. D'Amato).

It is true that the 1988 Act increased penalties for certain drug-related crimes, sometimes substantially. The Government errs, however, in assuming "harsh medicine" throughout the 1988 Act. For drugs other than crack cocaine – including heroin and other potent drugs, regardless of quantity – possession remained a misdemeanor, and one of the few federal crimes still permitting first offender treatment. 18 U.S.C. § 3607. Mandatory minimums were to be "commensurate with the seriousness of the crimes committed." *Id.* at S17353 (Sen. Thurmond). To paraphrase from *Busic*:

> As we understand it, the Government's argument is not that our construction reads Congress to have *diminished* the penalty for [drug possession while on probation], but only that our construction fails to enhance that penalty to the hilt. Yet it is patently clear that Congress too has failed to enhance that penalty to the hilt. . . . Thus, while Congress had a desire to deter [probationers' possession of controlled substances], that desire was not unbounded. Our task here is to locate one of the boundaries, and the inquiry is not advanced by the assertion that Congress wanted no boundaries.

446 U.S. at 408 (emphasis in original).

6. The 1988 Act's rushed enactment and "measured" response is mirrored in the instant provision. Section 7303 was submitted as an unnumbered section of a floor amendment on October 14, 1988 – the same day the Senate passed its version of the bill, and only a week before the final bill

was passed. 134 Cong. Rec. at S16170. The Government claims a silent legislative record, and cites to Senator Biden's unhelpful section-by-section analysis of § 7303. The Government ignores the corresponding section-by-section analysis in the House of Representatives:

> Section 7303 relates to the revocation of probation, parole or supervised release when such a person has been adjudicated by the court to have violated a criminal law relating to possession of an illegal drug. The provisions in this section are derived from the Senate amendments to the bill, but have been modified *to preserve essential elements of judicial or Parole Commission discretion.*

Id. at H11248 (emphasis added). In sum, although little can be gleaned from this section's specific legislative history, Congress' expressed desire for judicial discretion is significant. It rebuts the Government's view that Congress gave courts no choice but to impose long terms of imprisonment on probationers possessing drugs.

B. Subsequent Legislative History Confirms That Congress Intended a Measured Approach

This analysis is confirmed by recent legislative history. On February 25, 1993, Senator Thurmond introduced S. 468, because § 3565(a) as previously written was not unambiguous:

> The second critical provision of the bill . . . *clarifies an ambiguity in 18 U.S.C. § 3565(a)* that arises from that provision's language that "the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence."

139 Cong. Rec. at S2150 (emphasis added). Rather than having his bill clarify the ambiguity in the Government's favor, Sen. Thurmond notes that his bill is needed because some courts are "arbitrarily varying the sanction according to the length of the initially imposed term of probation." *Id.* at

S2151. His bill uses U.S.S.G. Chapter 7's revocation guidelines as the standard for resentencing. *Id.* at S2151. For Mr. Granderson, that range would be only 3-9 months. *See Gozlon-Peretz*, 498 U.S. at 406 ("[T]he view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value.").

VI. The Salutary Purposes of the Rule of Lenity Support its Application in this Case

This Court has not hesitated to apply the rule of lenity when statutory ambiguity exists. *See, e.g., United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 (1992); *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Crandon v. United States*, 494 U.S. 152, 168 (1990); *United States v. Kozminski*, 487 U.S. 931, 952 (1988); *Tanner v. United States*, 483 U.S. 107, 131 (1987); *Liparota*, 471 U.S. at 427-28; *Williams v. United States*, 458 U.S. 279, 290 (1982); *Bifulco*, 447 U.S. at 387 & 400-01; *Busic*, 446 U.S. at 406-08; *Whalen v. United States*, 445 U.S. 684, 694 (1980).

1. While a division of judicial authority is not "automatically sufficient to trigger lenity," *Moskal v. United States*, 498 U.S. 103, 108 (1990), the fact that a majority of circuits have rejected the Government's view may suggest that reasonable minds can differ as to § 3565(a)'s interpretation. *United States v. Yermian*, 468 U.S. 63, 78-79 (1984) (Rehnquist, J., dissenting) (fact that "natural reading" did not seem so natural to courts of appeals or dissenters should have indicated that Court's interpretation not compelled). This is not a case in which "one court's unduly narrow reading of a criminal statute would become binding on all other courts," *Moskal*, 498 U.S. at 108. Five separate courts of appeals – including one since the Government filed its brief – now reject the Government's view, often in unanimous opinions, and sometimes with denials of Government requests for in banc reconsideration. *United States v. Alese*, 1993 U.S. App. LEXIS 25110 (2d Cir. No. 93-1198, filed Sept. 28, 1993); *United States v. Diaz*, 989 F.2d 391 (10th Cir. 1993); *Clay*, 982 F.2d 959 (6th Cir.), *reh'g in banc denied*, 1993 U.S. App. LEXIS 7333 (6th Cir.), *cert. filed*, No. 93-52 (U.S. filed July 6, 1993); *Granderson*, 969 F.2d 980 (11th Cir.), *reh'g in banc denied*, 980 F.2d 1449 (11th Cir. 1992), *cert. granted*, 113 S. Ct. 3033 (1993); *Gordon*, 961 F.2d 426 (3d Cir. 1992).

The only three circuits currently adhering to the Government's view are the Ninth, the Eighth, and the Fifth Circuits. The Ninth was the first to address the issue, in *United States v. Corpuz*, 953 F.2d 526 (9th Cir. 1992). Shortly after *Corpuz* issued, its rule was followed without detailed analysis by the Eighth Circuit in *United States v. Byrkett*, 961 F.2d 1399 (8th Cir. 1992). At about the same time *Byrkett* issued, the Third Circuit issued *Gordon*, which rejected *Corpuz*'s rule. Since that time every circuit, except one, that has considered the issue has rejected *Corpuz*'s analysis. Even within the Ninth Circuit, certain judges have openly questioned *Corpuz*. *See United States v. Ohler*, 996 F.2d 1023, 1025 (9th Cir. 1993) ("Ohler makes a serious argument that *Corpuz* was incorrectly decided"); *United States v. Avakian*, 1992 U.S. App. LEXIS 32326 (9th Cir. No. 92-10269 filed Dec. 2, 1992) (Norris, J., concurring) ("I think *Corpuz* was decided incorrectly"), *cert. filed*, No. 92-8656 (U.S. filed May 5, 1993).[12]

The Government's only circuit convert since *Gordon* is the Fifth Circuit, in *United States v. Sosa*, 997 F.2d 1130 (5th Cir. 1993). The *Sosa* opinion, however, twice mistakenly refers to "parole" being revoked under § 3565(a), *id.* at 1133 ("Section 3565(a)(2) . . . states that if a defendant violates a condition of his parole . . . "); *id.* at 1133 n.6 ("when a defendant admits the commission of . . . drug related crimes, in violation of his parole, Congress intends a harsh punishment"), perhaps suggesting that the Fifth Circuit did not

---

[12] *Corpuz*'s decision was based in part on its mistaken belief that drug possession was a Grade A violation under the revocation guidelines. 953 F.2d at 530. This was wrong; the term "controlled substance offense" in the revocation guidelines includes only drug offenses involving actual or intended manufacturing or distribution. U.S.S.G. § 7B1.1 Application Note 3; *id.* § 4B1.2(2). Simple possession is a Grade C violation under the revocation guidelines. Thus, *Corpuz*'s analysis was flawed.

examine the issue as carefully as some of the other circuits.[13] *Sosa*'s analysis was recently rejected by a unanimous panel of the Second Circuit in *Alese*.

The Government seeks to minimize these adverse rulings by claiming that lower courts rejecting its view "appear to have done so" not because of statutory ambiguity, "but rather because they view it as an unduly harsh penalty." Gov't Br. at 29. Nothing supports this accusation that the lower courts essentially have abdicated their judicial duties. Contrary to any claim that the court of appeals' decision here was an emotional one, Judge Phyllis Kravitch's opinion states that the Government's interpretation "would lead to unreasonably harsh results *not clearly intended by Congress*." Gov't Br. at 29 note 6. The Government inexplicably disregards the underlined part of this quotation, which reveals that the court of appeals properly applied the rule of lenity only after finding sufficient statutory ambiguity.

2. Applying the rule of lenity would serve its recognized purpose of minimizing risks of selective or arbitrary enforcement. *Kozminski*, 487 U.S. at 952. If the Government's view is adopted, some judges will continue giving the same probation terms, while others, recognizing that probation terms may be tied to harsh revocation sentences, may hesitate to order supervision for as long as otherwise might seem warranted. Some defendants will submit to drug testing, while others who know of § 3565(a) might refuse to be tested, since no minimum exists for such refusals. Some revocation petitions will continue charging drug "possession," while others might charge only drug "use," which again carries no minimum.

Applying the rule of lenity will minimize this risk. No huge disparities will exist between revocation sentences for

---

[13] *Sosa* also expressly ignored the historical distinction between probation and imprisonment. *Id.* at 1133. Its review of the legislative history consisted of merely noting that Sosa had cited none, and that the Ninth Circuit had found none. *Id.* at 1134. *Sosa* did not address the "misdemeanor problem" or other disparities that had caused judges in the Ninth Circuit to question the very *Corpuz* decision on which *Sosa* relied.

drug possession and those for every other violation. The incentives causing such arbitrary results will be reduced, if not eliminated.

3. The rule of lenity is "rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should." *R.L.C.*, 112 S. Ct. at 1338. Congress has not clearly said that Mr. Granderson, who received no warning that his receipt of probation vastly increased his jail exposure, must now go back to jail for another 1½ times his guideline maximum, despite his demonstrated rehabilitation.

There is no "overriding consideration of being lenient to wrongdoers" here. Gov't Br. at 30. The court of appeals' ruling, requiring a minimum of 60 days in jail for Mr. Granderson, is four times harsher than any minimum penalty he would face even if convicted as a repeat drug possessor. Because it cannot be said beyond a "reasonable doubt" that the Government's view of § 3565(a) is correct, *Moskal*, 498 U.S. at 108, the rule of lenity must be applied. This case should be treated in the same way as *Bifulco*:

> Our analysis reveals, at the least, a complete absence of an unambiguous legislative decision. . . . Of course, to the extent that doubts remain, they must be resolved in accord with the rule of lenity. If our construction of Congress' intent, as evidenced by the scant record it left behind, clashes with present legislative expectations, there is a simple remedy – the insertion of a brief appropriate phrase, by amendment, into the present language of § [3565]. But it is for Congress, and not this Court, to enact the words that will produce the result the Government seeks in this case.

447 U.S. at 400-01. *Accord Tanner*, 483 U.S. at 131 (unanimous on this point).

CONCLUSION

The district judge did not merely sentence Mr. Granderson, upon revocation, to the top of his established guidelines range. Instead, grudgingly following the Government's advice, the judge ordered him to serve that maximum sentence again, and then again, and then a third as long yet again. The tradition of probation, the language, context and application of § 3565(a), its legislative history, and the rule of lenity all favor the court of appeals' view of "original sentence." The district judge, who stated his hope that Mr. Granderson would appeal and win a reversal, should be told that he can avoid the needless incarceration the Government says is required. This Court should affirm the court of appeals.

Respectfully submitted.

STEPHANIE KEARNS
Federal Defender
Co-counsel

GREGORY S. SMITH
Staff Attorney
Counsel of Record

October 1993

No. 92-1662

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH STUART GRANDERSON, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

Statutes and rules—Continued:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1662

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH STUART GRANDERSON, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent argues at length that his preferred interpretation of 18 U.S.C. 3565(a) (Supp. IV 1992) reflects a more sensible and appropriate response to the problem of drug abuse by probationers than does the interpretation suggested by the plain language of the statute. Respondent has failed to point to any plausible basis for construing the statutory text in the manner he urges, however, and thus his policy arguments are entirely beside the point.

1. Respondent does not seriously dispute the proposition, established in our opening brief (U.S. Br. 12-13), that probation is a sentence for purposes of federal sentencing law. Respondent argues instead (Br. 11-14) that, while probation is a sentence under the Sentencing Reform Act of 1984, the 1984 Act's

departure from prior law "was meant as a semantic change" and thus "probation revocations are still to be treated as breaches of trust." Resp. Br. 12, 13.[1]

However one characterizes probation revocation, the dispositive fact is that, as respondent essentially concedes, federal sentencing law deems probation to be a type of sentence. As a result, there is no basis for accepting respondent's interpretation of the statute, which would exclude probationary sentences from the scope of the phrase "original sentence" as used in Section 3565(a).

2. Respondent's principal contention is that, for purposes of Section 3565(a), his "original sentence" was 0-6 months' imprisonment, the presumptive range of imprisonment established by the Sentencing Guidelines for his offense. That contention must be rejected, because it is inconsistent with any possible meaning of the phrase "original sentence" as that phrase is used in the English language or in criminal law.

a. Respondent asserts (Br. 15-16) that the dictionary definition of the word "original" supports his conclusion that the presumptive range of imprisonment set forth in the Guidelines is the "original sentence" of a defendant who was actually sentenced

[1] Respondent also contends (Br. 13-14) that the 1984 Act's change in the treatment of probation "was not designed to force an increase in probationers' revocation sentences." That claim is irrelevant, because it was the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7303, 102 Stat. 4464, not the 1984 Act, that "force[d] an increase in probationers' revocation sentences" by imposing a mandatory minimum sentence of "one-third of the original sentence."

to a term of probation instead of imprisonment.[2] Because "original" can mean "of or relating to a rise or beginning," "constituting a source," or "constituting the product or model from which copies are made" (Br. 15, quoting *Webster's Third New International Dictionary* 1592 (1986)), respondent concludes that "original sentence" must mean the "source" or "beginning" of the sentencing process—*i.e.*, the presumptive Guidelines imprisonment range, not the "derivative" or "secondary" sentence of probation imposed on a defendant in place of imprisonment.

Respondent's attempt to evade the ordinary meaning of "original sentence" suffers from two fatal flaws. First, the logic of respondent's argument would suggest that the proper benchmark for purposes of Section 3565(a) is the statutory sentencing range prescribed by Congress rather than the Guidelines imprisonment range developed by the Sentencing Commission, because the Guidelines range is

[2] Respondent appears to contend (Br. 35-36) that the sentence he originally received—five years' probation—was in fact drawn from within the presumptive 0-6 month range of imprisonment prescribed by the Guidelines for his crime. It is unclear what support respondent draws from that contention, but in any event it is incorrect. Under federal sentencing law, as respondent concedes elsewhere (Br. 24), probation and imprisonment are mutually exclusive sentences. See 18 U.S.C. 3561(a)(3); Guidelines §§ 5B1.1(b)(3), 5C1.1. Thus, while a sentence of zero months' imprisonment is theoretically possible when the Guidelines prescribe a presumptive 0-6 month imprisonment range, that is not the sentence that was actually imposed on respondent in this case. Respondent received a sentence of probation, which necessarily means that he did not receive a sentence of imprisonment at all, let alone a sentence of imprisonment from within the presumptive Guidelines imprisonment range.

"derivative" of and "secondary" to the "original" statutory sentencing range. For obvious reasons, respondent prefers that his sentence upon revocation be determined by reference to the shorter Guidelines range, but he fails to explain why his interpretation of the word "original" does not point instead to the range prescribed by statute—in this case, a term of imprisonment of "not more than five years." 18 U.S.C. 1703(a).

b. Second, and more fundamentally, respondent's reasoning ignores the second word of the very phrase he purports to construe. Even if it could plausibly be said that the Guidelines imprisonment range (and not the statutory imprisonment range) is the "original" sentencing range applicable to a defendant, it would not follow that the Guidelines imprisonment range is the defendant's "original *sentence*," because that range is simply not the defendant's *sentence* at all.

As used in the criminal law, the word "sentence" means "[t]he judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, imposing the punishment to be inflicted, usually in the form of a fine, incarceration, or probation," or a "[j]udgment of [a] court formally advising [the] accused of [the] legal consequences of guilt." *Black's Law Dictionary* 1362 (6th ed. 1990). Thus, the word "sentence" means the punishment imposed on a defendant for his crime.[3] It

[3] Respondent errs in contending (Br. 18 & n.3) that our interpretation of Section 3565(a) rests upon inconsistent definitions of the word "sentence." To the contrary, it is his preferred construction that rests on different definitions of the word: in respondent's view, "sentence" sometimes carries its dictionary meaning, but at other times it means the range of

does not mean—unless accompanied by modifying words such as "potential," "available," or "possible" —the range of alternative punishments that could have been, but were not, imposed on a defendant instead.[4]

---

punishments that could have been imposed but were not. Under our construction of the statute, by contrast, the meaning of the word "sentence" is consistent: as a noun, it means the judgment of the court setting forth the punishment to be imposed on a defendant; as a verb, it means to impose a sentence. Either as a noun or a verb, of course, "sentence" can refer to a term of probation or a term of imprisonment; whether one or the other of those types of sentence is being referred to depends on the context in which the word is used.

[4] Federal sentencing law consistently uses the word "sentence" to refer to the punishment that was actually imposed on a defendant. See, *e.g.*, 18 U.S.C. 3551(b) and (c), 3553(a), (b), (c), and (e), 3554, 3555, 3556, 3557, 3558, 3562(b) (Supp. IV 1992), 3563(a) (Supp. IV 1992), (b) (Supp. IV 1992), (c), and (d), 3564(a) and (e), 3565 (Supp. IV 1992), 3566; Guidelines § 5C1.1. Respondent errs in suggesting (Br. 30) that 18 U.S.C. 3742 (Supp. IV 1992) is to the contrary. That provision authorizes an appeal if a defendant's sentence "is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range." 18 U.S.C. 3742(a)(3); see also 18 U.S.C. 3742(b)(3) (analogous provision for sentences below Guidelines range). The ordinary meaning of the word "sentence" is plainly modified by the context in which the word first appears in Section 3742(a)(3), because the phrase "the sentence specified in the applicable guideline range" necessarily refers to the maximum sentence that could have been imposed under the Guidelines instead of the sentence that was actually imposed. The phrase "original sentence," by contrast, is not modified by any word or phrase such as "available," "potential," or "specified in the applicable guideline range," and thus it cannot be construed as if it were so modified.

As we argue in our opening brief (U.S. Br. 15-17), and as respondent appears to acknowledge (Resp. Br. 15-16 & n.2), the word "original" simply does not mean "available" or its equivalent.[5] Thus, the phrase "original sentence" cannot be construed to mean the range of available, potential, or possible sentences that could have been, but were not, imposed on the defendant. Instead, it must mean the "beginning" or "initial" "judgment * * * imposing the punishment to be inflicted"—in this case, the original sentence of five years' probation.[6]

3. For the foregoing reasons, in cases in which the defendant receives a sentence of probation at his or her initial sentencing, the phrase "original sentence" must be understood to refer to that sentence of probation. Therefore, it follows logically from the text and structure of Section 3565(a) that a defendant

[5] For that reason, respondent plainly errs in suggesting (Br. 18-20, 31) that "original sentence" is nothing more than Congress's shorthand reference to "any other sentence that was *available* under subchapter A at the time of the initial sentencing." 18 U.S.C. 3565(a)(2) and (b) (emphasis added).

[6] Respondent contends (Br. 16) that the other statutes in which Congress has used the phrase "original sentence" are inconsistent with our interpretation of that phrase because those statutes do not contemplate that "probation is now to be its exclusive meaning." That probation is not always a defendant's "original sentence" in those statutes, however, is completely irrelevant. The crucial point—and one that respondent does not even attempt to refute—is that Congress has always used the phrase "original sentence" to refer to the sentence that was actually imposed on a defendant, not the range of possible sentences that could have been imposed instead. See U.S. Br. 19-20, citing 10 U.S.C. 863; 18 U.S.C. 4214(d)(4); Fed. R. Crim. P. 35(a)(2). Respondent offers no basis for concluding that Congress meant the phrase to have a different meaning in Section 3565(a).

whose probation is revoked for possession of illegal drugs must receive a sentence of imprisonment that is at least one-third as long as the "original sentence" of probation. Respondent has failed to identify any persuasive argument to the contrary.

a. Respondent criticizes (Br. 17-18, 26 & n.5) our contention that the phrase "not less than one-third of the original sentence" in Section 3565(a) refers to the length, not the type, of the sentence originally imposed on the defendant.[7] It is certainly possible, however, to read that phrase in the manner we urge. If anything, that is the more natural reading of the phrase, because the words "not less than one-third" necessarily contemplate a quantity, not a type, of whatever happens to be their object.

To be sure, that is not the only possible way to read the phrase at issue. Read in isolation, it could mean either (1) not less than one-third of the length of the original sentence (in this case, 20 months), or (2) not less than one-third of the length *and* the type of the original sentence (in this case, 20 months *of probation*). The latter interpretation must be rejected, however, because it would lead to the conclusion that probationers who possess illegal drugs are to be rewarded for that conduct by imposition of a new

[7] Respondent mischaracterizes our argument in contending (Br. 17) that we read the phrase "original sentence" itself to refer "only to the *length*, and not the *type*," of sentence originally imposed on a defendant. The phrase "original sentence," as applied to a defendant who originally received a sentence of probation, naturally refers both to the length and the type of the sentence. Read against the backdrop of the sentencing scheme established by Section 3565(a), however, the phrase "*not less than one-third of* the original sentence" plainly refers to the *length* of the original sentence, not its type.

sentence of probation that is only one-third as long as their original sentence of probation.

That result would be absurd and plainly inconsistent with Congress's evident purpose in adopting the provision at issue in this case.[8] Indeed, respondent concedes as much, asserting that construing Section 3565(a) to permit imposition of a new, shorter sentence of probation on defendants who have possessed illegal drugs would be "an absurd result." Resp. Br. 6, 17. Statutes must be construed, where possible, to avoid absurd consequences. *Rowland* v. *California Men's Colony*, 113 S. Ct. 716, 720 (1993); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). That canon of construction can be satisfied in this case only by adopting the interpretation we urge, which avoids the patent absurdity of rewarding drug possession while still giving effect to the plain meaning of the statutory text.

Moreover, as we discuss in our opening brief (U.S. Br. 14-15), the conclusion that the last sentence

---

[8] Respondent argues at length (Br. 38-45) that the legislative history of the Anti-Drug Abuse Act of 1988 demonstrates congressional desire to follow a "measured" approach to the problems of drug possession and use in this country. Respondent nowhere identifies any indication, however, that Congress intended to treat persons who possess drugs with particular *leniency* or to encourage such conduct by making possible a reduction in the sentence otherwise being served by such persons. Rather, respondent's discussion of the 1988 Act makes clear that Congress consistently enhanced the potential punishments and other adverse consequences applicable to persons who use, possess, or traffic in illegal drugs. For that reason, it would be inconsistent with every available indication of congressional intent to construe Section 3565(a) in a manner that permits imposition of a new and shorter sentence of probation.

of Section 3565(a) requires courts to impose a sentence of imprisonment upon revocation is also compelled by the structure of Section 3565(a). The overall plan of that subsection demonstrates that probation is never a possible sentence once a defendant's probation has been revoked, because the consequence of revocation is that some "other" sentence must be imposed instead. 18 U.S.C. 3565(a)(2). Indeed, respondent agrees with that conclusion. He notes (Br. 19) that when a defendant violates the conditions of probation, Section 3565(a) usually permits the court to choose between either (a) continuing the defendant's probation or (b) revoking probation and imposing a different sentence, but that "[t]he final sentence of § 3565(a) * * * clarifies that courts do not have such discretion when a defendant possesses drugs on probation." In short, probation is no longer a permissible option under Section 3565(a) once the original sentence of probation has been revoked, and thus it is indisputable that the mandatory sentence of "not less than one-third of the original sentence" refers to a sentence of imprisonment.[9]

---

[9] Respondent asserts (Br. 18) that "the 'length' of the Government's 'original sentence' is unclear" because "[a] 'fine' also is described in the 1984 [Sentencing Reform] Act as a 'sentence.'" The fact that a fine is also a sentence under federal sentencing law creates no ambiguity in our interpretation of Section 3565(a). When the "original sentence" includes a sentence of probation—as is always the case under the provision at issue here—it is impossible to read Section 3565(a) to require imposition of a *fine* that is "not less than one-third of" the original sentence of probation. Probation, like imprisonment, is measured in months, whereas fines are measured in dollars, so there is no difficulty in determining whether imprisonment or a fine is to be imposed in lieu of the probationary term originally imposed. The phrase "not less than one-third of the

b. Respondent appears to take the position that the phrase "not less than one-third of the original sentence" refers to the full range of potential imprisonment terms indicated by the Guidelines.[10] As we indicate in our opening brief (U.S. Br. 20-21), the obvious implication of that position is that the mandatory minimum sentence for probationers who possess drugs is one-third of the minimum sentence prescribed by the Guidelines. Because the Guidelines range applicable to defendants who are placed on probation is typically 0-6 months' imprisonment, respondent's position leads to the absurd result that Section 3565(a) permits those defendants to possess drugs while on probation and then receive a sentence of *zero* months' imprisonment in lieu of their preexisting sentence of probation.

Implicitly recognizing the absurdity of that result, the courts of appeals that agree with respondent's interpretation of "original sentence" have simply ignored the logical consequences of their reasoning and, without any attempt to explain or justify their approach, have looked exclusively to the maximum presumptive Guidelines sentence in determining the minimum sentence under Section 3565(a). See U.S. Br. 21. While not expressly adopting that approach as his own, respondent attempts (Br. 32-33) to defend it. According to respondent, apparently, "original sentence" means "any other sentence that was available" at the time of initial sentencing, and the phrase "any other sentence that was available" can be construed to mean "the maximum sentence that was available."[11]

Even if "any other sentence that was available" were a possible meaning of "original sentence," the next step of respondent's argument—that the former phrase can be read to refer exclusively to the maximum available sentence—would not follow. Under 18

---

original sentence," when applied to a sentence of probation, necessarily yields a minimum quantity of months, and the only way to sentence a defendant to a term of months is to impose a sentence of imprisonment.

[10] See, *e.g.*, Resp. Br. 20 (mandatory minimum sentence of "not less than one-third of * * * a defendant's established guideline *range*") (emphasis added); *id.* at 31 ("Mr. Granderson's 'original sentence' meant his guidelines *range*.") (emphasis added). It is, at best, unusual to speak of a fraction of a *range* of numbers, which is another reason for rejecting respondent's interpretation of the phrase "original sentence." See U.S. Br. 20. Respondent suggests (Br. 31), however, that our interpretation of the statute suffers from a similar flaw, because "[a] term of probation * * * is not static." The fact that a court may revise the term of probation applicable to a particular defendant or impose conditions that must be satisfied during some or all of that term does not undermine the certainty provided by our interpretation of Section 3565(a), because at any given time a defendant's "original sentence" of probation will always be expressed as a discrete term of months rather than as a range. The same cannot be said of respondent's preferred construction of the statute.

[11] As noted in our opening brief (U.S. Br. 22), the logic of that interpretation suggests that the appropriate benchmark for determining the minimum sentence under Section 3565(a) should be the maximum *statutory* sentence, since that is the true "maximum available sentence" at the initial sentencing hearing. Respondent mistakenly characterizes that point as our "fall-back position." Br. 37. We do not suggest that that is a possible interpretation of the statute; to the contrary, it is plainly impermissible, because it rests on the same flawed interpretation of "original sentence" as does respondent's construction of the statute. The point is simply that respondent repeatedly ignores the logical implications of his arguments in order to achieve his desired result.

U.S.C. 3565(a)(2), when a court revokes the defendant's probation and imposes "any other sentence that was available * * * at the time of the initial sentencing," the court is not limited to the *maximum* initially available sentence; rather, as the language of the statute plainly indicates, the court can impose "*any*" sentence from within the initially available range.[12] Indeed, respondent elsewhere agrees with that reading of Section 3565(a)(2) (see Br. 19), so it is impossible to understand the basis for his conclusion that the same provision can be read to refer only to the maximum available sentence when it is incorporated by reference in the phrase "original sentence."

Thus, respondent's claim that the phrase "original sentence" refers to the Guidelines presumptive imprisonment range leads either to an absurd result (*i.e.*, no minimum sentence at all for the largest category of probationers who possess illegal drugs) or to a glaring internal inconsistency (*i.e.*, rejection of the implications of respondent's position by treating "original sentence" as the *maximum* Guidelines sentence rather than the Guidelines range). Either result would be sufficient reason for rejecting respondent's interpretation even if the phrase "original sentence" could otherwise plausibly be read to mean an "initially available but rejected sentence."

---

[12] See, *e.g.*, *United States* v. *Boyd*, 961 F.2d 434, 438 (3d Cir.), cert. denied, 113 S. Ct. 233 (1992); *United States* v. *Alli*, 929 F.2d 995, 997-998 (4th Cir. 1991); *United States* v. *Williams*, 961 F.2d 1185, 1187 (5th Cir. 1992); *United States* v. *Von Washington*, 915 F.2d 390, 391 (8th Cir. 1990); *United States* v. *Dixon*, 952 F.2d 260, 261-262 (9th Cir. 1991); *United States* v. *Maltais*, 961 F.2d 1485, 1486-1487 (10th Cir. 1992); *United States* v. *Smith*, 907 F.2d 133, 135-136 (11th Cir. 1990).

c. Respondent contends (Br. 21-28) that his interpretation of Section 3565(a) draws support from Congress's treatment of persons who possess drugs while on supervised release, as set forth in 18 U.S.C. 3583(g).[13] According to respondent, Congress's failure to use identical language in Sections 3583(g) and 3565(a) demonstrates that those provisions were intended to dictate dramatically different responses to the problem of convicted criminals who possess illegal drugs while enjoying the benefits of conditional release.[14] That contention is without merit.

---

[13] Respondent also relies on Congress's treatment of defendants who possess drugs while on parole. See Resp. Br. 28-30 (citing 1988 Act § 7303(c), codified at 18 U.S.C. 4214(f)). Congress's treatment of parolees sheds no light on the meaning of Section 3565(a), however, because the parole provision—unlike Sections 3583(g) and Section 3565(a)—does not include any language imposing a mandatory minimum sentence.

[14] Respondent also contends (Br. 23-25, 27-28) that defendants who possess drugs while on probation should be treated more leniently than defendants who possess drugs while on supervised release because members of the former group have usually committed the more serious crimes and have already served a term of imprisonment. Respondent's policy preferences are beside the point, however, because they shed no light on Congress's intent in adopting the statute. Congress could just as easily have determined to punish particularly severely those defendants who are extended special leniency and trust in the form of a sentence of probation and who then breach that trust by possessing illegal drugs.

We note, moreover, that respondent is simply wrong in asserting (Br. 27) that, while supervised release terms vary according to the severity of the underlying offense, "[n]o such gradations exist for probation." The authorized terms of probation vary depending on whether the underlying offense is a felony (one to five years), a misdemeanor (not more than five years), or an infraction (not more than one year). 18 U.S.C. 3561(b). Moreover, defendants whose offenses are sufficiently

Respondent points to two differences between Sections 3583(g) and 3565(a) that, in his view, require that the provisions be interpreted to achieve different results. First, Section 3583(g) requires imposition of a sentence that is "not less than one-third of the *term of supervised release*," whereas Section 3565(a) requires imposition of a sentence that is "not less than one-third of the *original sentence*." As we explain in our opening brief (U.S. Br. 27-28), however, Congress could not have used the phrase "original sentence" in lieu of "term of supervised release" in Section 3583(a). A term of supervised release, unlike a sentence of probation, is always imposed as "part of" a sentence of imprisonment (18 U.S.C. 3583(a)), and thus it would have been unclear whether the phrase "original sentence" in Section 3583(g) was intended to refer to the term of imprisonment, the term of supervised release, or both.

Respondent does not seriously dispute that point.[15] Instead, he argues (Br. 22) that we failed to explain

minor that their Guidelines offense level is less than 6 may receive no more than three years' probation, whereas defendants whose offense level is 6 or greater must receive at least one year's probation. Guidelines § 5B1.2(a).

[15] Respondent does contend (Br. 22) that "[p]robation * * * also is often only 'part of' a sentence initially imposed, since the sentence imposed may include a fine." That contention is incorrect. While both probation and a fine may be imposed on the same defendant, they remain separate sentences. See 18 U.S.C. 3551(b) ("A sentence to pay a fine may be imposed in addition to any *other sentence*" such as probation) (emphasis added); Guidelines, ch. 5, pt. B, Introductory Commentary (probation is "a sentence in and of itself"). Supervised release, on the other hand, is not a sentence in its own right, but is merely "part of" a sentence of imprisonment. 18 U.S.C. 3583(a); see also 18 U.S.C. 3551(b) (describing sentences that

why Congress chose not to tailor the language of Section 3565(a) more closely to the language used in Section 3583(g). The reason, however, should be obvious. Section 3583(g) had to use the phrase "supervised release" in order to make its meaning clear. Section 3565(a), of course, could not use that phrase, because it deals with probation instead. Thus, Congress had to select a different phrase, and the one it chose—"original sentence"—necessarily refers to the sentence of probation that was initially imposed on the defendant after his conviction.

The second difference between Sections 3565(a) and 3583(g) on which respondent relies (Br. 23, 26 & n.5) is that Section 3565(a) does not expressly provide that the defendant must be sentenced to serve at least one-third of the previous sentence "in prison." Again, however, that difference is explained by the statutory schemes at issue.

As we have demonstrated (see pp. 7-9, *supra*; U.S. Br. 14-15), and as respondent concedes (Br. 19), Section 3565(a) makes clear that a new sentence of probation is never an option once a defendant's previous sentence of probation has been revoked.[16] Thus,

may be imposed on individuals as "a term of probation," "a fine," and "a term of imprisonment").

[16] Given respondent's agreement (Br. 19) that probation is never an option once a previous sentence of probation has been revoked, it is difficult to understand the basis for his argument that the government's interpretation of Section 3565(a) should be rejected because that provision does not contain the "in prison" language included in Section 3583(g). After all, if that were a valid criticism, it could be directed with equal force against respondent's preferred construction of the statute, because he takes the position that Section 3565(a) requires imposition of a sentence from within the Guidelines' presumptive *imprisonment* range rather than a new sentence of probation.

there is no need for Section 3565(a) to specify the type of sentence to be imposed on defendants for "not less than one-third of the original sentence"; imprisonment is the only remaining option.[17]

Section 3583(g) requires the court to "terminate" the supervised release of a defendant who possesses illegal drugs. Normally, however, no sentence of imprisonment follows the "terminat[ion]" of supervised release; instead, the defendant is simply released from any further supervision. 18 U.S.C. 3583(e)(1). It was therefore necessary for Congress to make clear that a term of imprisonment was to follow termination of supervised release for drug possession; unlike in the probation context, where continuation on probation can never follow revocation (compare 18 U.S.C. 3565(a)(1) with 18 U.S.C. 3565(a)(2)), congressional silence on the type of sentence required by Section 3583(g) would have left courts free to reimpose a new term of supervised release, thereby frustrating Congress's purpose. Accordingly, Congress added the phrase "in prison" to Section 3583(g) because it was necessary to make the legislative intention plain. Congress left that phrase out of Section 3565(a), where the same result was implicit in the statutory scheme.[18]

---

[17] Supervised release is not a valid alternative way of satisfying the minimum term required by Section 3565(a), because supervised release can be imposed only as part of a sentence of imprisonment (18 U.S.C. 3583(a)), and defendants on probation have by definition not yet received such a sentence. 18 U.S.C. 3561(a)(3).

[18] Respondent also contends (Br. 34-35) that his interpretation of Section 3565(a) draws support from Chapter 7 of the Sentencing Guidelines, which addresses the subject of probation revocation. As respondent concedes, however, even the provisions of Chapter 7 suggest a minimum sentence (3-9 months' imprisonment) that is more severe than the minimum sentence required under his interpretation of Section 3565(a). More importantly, Chapter 7 of the Guidelines was not promulgated by the Sentencing Commission until November 1, 1990, two years *after* adoption of the statutory provision at issue in this case, and thus it is inconceivable that Congress could have intended Section 3565(a) to be construed in light of the provisions of Chapter 7. In any event, Chapter 7 is merely a set of advisory policy statements issued by the Commission without submission to Congress (see, *e.g.*, *United States* v. *Thompson*, 976 F.2d 1380, 1381 (11th Cir. 1992) (per curiam); Guidelines Manual, ch. 7, pt. A(3)(a), at 322 (Nov. 1, 1993)), and it expressly contemplates that statutory mandatory minimum sentences such as that set forth in Section 3565(a) will take precedence over the imprisonment range suggested by the Guidelines. See Guidelines § 7B1.4(b)(2) (policy statement) ("Where the minimum term of imprisonment required by statute * * * is greater than the maximum of the applicable range, the minimum term of imprisonment required by statute shall be substituted for the applicable range."); *id.*, Application Note 5 (noting that Section 3565(a) imposes mandatory minimum sentence for drug possession).

d. Respondent also contends (Br. 33-34) that our interpretation of Section 3565(a) should be rejected because, in the case of defendants convicted only of misdemeanors, it could in theory result in a sentence upon revocation that is longer than the statutory maximum sentence applicable to the underlying offense. That contention is without merit.

In the first place, the sentence mandated by Section 3565(a) is itself part of the statutory maximum sentence applicable to the underlying offense. When a defendant is convicted of a misdemeanor, it is always possible that the defendant will be sentenced to a term of supervised release or probation that carries with it the possibility of additional incarceration upon revocation, and that additional term of incarceration may

well exceed the length of the term of imprisonment that could have been imposed for the offense at the initial sentencing hearing.

For example, a defendant convicted of a Class A misdemeanor (see 18 U.S.C. 3581(b)(6)) and sentenced to 12 months' imprisonment to be followed by 12 months' supervised release would, upon revocation of supervised release, face the possibility of serving an additional 12 months in prison (for a total of 24 months), even though the maximum term of imprisonment available at the initial sentencing hearing was only 12 months. See 18 U.S.C. 3583(e)(3) (Supp. IV 1992) (court may "revoke a term of supervised release, and require the person to serve in prison *all or part* of the term of supervised release") (emphasis added). If termination of the defendant's supervised release resulted from drug possession, moreover, Section 3583(g) would *require* at least four months' imprisonment in addition to the 12 months previously served.

Thus, Section 3565(a) is hardly unique in creating the possibility that the amount of time a defendant spends in prison may ultimately exceed the maximum term of imprisonment that could have been imposed at the defendant's initial sentencing hearing. Contrary to respondent's suggestion (Br. 34, citing *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986)), that possibility should not be deemed to undermine the constitutionality of the sentencing scheme created by Congress. The fact that the maximum punishment possible for a defendant cannot be imposed at the initial sentencing hearing and depends upon the defendant's post-conviction conduct does not change the fact that Congress expressly authorized that maximum punishment even for misdemeanors.

In any event, any purported constitutional infirmity in Section 3565(a), as applied to misdemeanor sentences, would not provide a proper basis for rejecting our interpretation of that statute. No such claim of unconstitutionality can be made in this case, because respondent was convicted of a felony punishable by five years' imprisonment followed by a three-year term of supervised release. 18 U.S.C. 1703(a), 3581(b)(4), 3583(b)(2). Moreover, the fact that Section 3583(g) creates the same possibility of an allegedly unconstitutional sentence eliminates any basis for the claim that Congress cannot be deemed to have intended that result in Section 3565(a).

e. Finally, respondent argues that a variety of policy reasons support his proposed construction of Section 3565(a). First, respondent asserts that the length of a defendant's sentence of probation is a bad "barometer" for determining the appropriate punishment upon revocation (Br. 32), and that Section 3565(a) should not be construed to impose longer terms of imprisonment on probationers who possess drugs than would be imposed if they had been convicted of simple possession instead (Br. 34). Those concerns do not, however, undermine the validity of our interpretation of Section 3565(a). Similar objections could be leveled against Section 3583(g), but Congress was obviously untroubled by those concerns in the supervised release context. There is no reason to believe it had a different view with respect to probation.

Second, respondent asserts (Br. 33) that Section 3565(a) should not be construed in a manner that results in harsher sentences for probationers who possess drugs than Section 3565(b) mandates for probationers who possess firearms. That same result

follows from Section 3583, however, which contains no mandatory revocation provision for possession of firearms, but requires imposition of a mandatory minimum term of imprisonment on defendants who possess drugs while on supervised release. The purported anomaly identified by respondent is explained by the fact that the Anti-Drug Abuse Act of 1988 was primarily aimed at discouraging the use and possession of drugs, not firearms. See U.S. Br. 23-26.[19] Thus, it is hardly surprising that Congress chose to enact provisions requiring substantial mandatory minimum sentences of imprisonment in cases of drug possession.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

NOVEMBER 1993

---

[19] Moreover, even the court of appeals' interpretation of Secton 3565(a) yields a minimum sentence that is greater than the minimum sentence for firearms possession under Section 3565(b).

APPENDIX

STATUTES INVOLVED

18 U.S.C.:

§ 3551. **Authorized sentences**

* * * * *

(b) **Individuals.**—An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

(1) a term of probation as authorized by subchapter B [18 U.S.C. 3561-3566];

(2) a fine as authorized by subchapter C [18 U.S.C. 3571-3574];

(3) a term of imprisonment as authorized by subchapter D [18 U.S.C. 3581-3586].

A sentence to pay a fine may be imposed in addition to any other sentence. * * *

* * * * *

§ 3561. **Sentence of Probation**

(a) **In general.**—A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—

* * * * *

(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense.

* * * * *

No. 92-1662

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

RALPH STUART GRANDERSON, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE RESPONDENT RALPH STUART GRANDERSON, JR.

R. WILLIAM IDE III *
President
AMERICAN BAR ASSOCIATION
ANTONIA B. IANNIELLO
JEROME C. ROTH
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 92-1662

UNITED STATES OF AMERICA,
Petitioner,
v.
RALPH STUART GRANDERSON, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE RESPONDENT RALPH STUART GRANDERSON, JR.

INTEREST OF THE AMICUS CURIAE

The American Bar Association (the "ABA") is a voluntary national organization of the legal profession. With a membership of more than 380,000 individuals from every state and territory, its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legislators, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.[1]

[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Administration Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Administration Division Council prior to filing.

Since its inception over 100 years ago, the ABA has taken an active interest in improving the administration of criminal justice and, in particular, ensuring both the effectiveness and the fairness of criminal sentencing. Toward these ends, the ABA has promulgated comprehensive sets of standards governing all important facets of the criminal justice system. *See* ABA *Standards for Criminal Justice*. These standards include comprehensive substantive and procedural guidelines concerning sentencing. *See* ABA *Standards Relating to Sentencing Alternatives and Procedures*. Through dissemination of these standards and the work of its Criminal Justice Section and other divisions, the ABA has sought to achieve a criminal justice system that is fair, balanced and constitutionally responsive to the needs of today and the future.

The ABA seeks to appear as *amicus curiae* in this case to voice its conviction that sentencing statutes for probation violation should not be construed to impose prolonged sentences in excess of terms available under sentencing guidelines, absent clear indication of a Congressional purpose to do so. Moreover, because prolonged mandatory minimum sentences have so harmful an impact on the fairness and efficacy of our criminal justice system and because they undermine the vital role of judicial discretion in sentencing, they should not be inferred in cases—like this one—where the terms of the sentencing statute are ambiguous.[2]

SUMMARY OF ARGUMENT

Section 3565(a) of Title 18 provides that, upon finding that a defendant has violated a condition of probation, the court may continue probation or instead may revoke it and impose any sentence that was originally available for the underlying crime. The statute goes on to state that, "[n]otwithstanding any other provision of this section, when a defendant is found in possession of a controlled substance . . ., the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence."

[2] Copies of letters indicating the parties' consent to the filing of this brief have been filed with the Clerk of the Court.

Five Courts of Appeals, including the Eleventh Circuit below,[3] have agreed that the phrase "original sentence" in this clause refers to the sentence originally available under the Sentencing Guidelines—an interpretation that would typically result in a mandatory required sentence of two months. In arguing for reversal, the Government would have the Court instead interpret "original sentence", as have three Courts of Appeals,[4] to mean the actual term of probation, thus compelling the arbitrary conversion of a term of probation into a prison term of up to twenty months.[5]

The Government claims that its reading of "original sentence" is the only viable one and that Congress intended to strip federal judges of discretion and to require a prolonged prison term dependent on the length of the original probation term in every case where a probationer is found to possess controlled substances. But that harsh

[3] See *United States v. Granderson*, 969 F.2d 980 (11th Cir. 1993); *United States v. Alese*, No. 93-1198, 1993 U.S. App. LEXIS 25110 (2d Cir. Sept. 28, 1993); *United States v. Diaz*, 989 F.2d 391 (10th Cir. 1993); *United States v. Clay*, 982 F.2d 426 (6th Cir. 1992); *United States v. Gordon*, 961 F.2d 426 (3d Cir. 1992).

[4] *See United States v. Sosa*, No. 92-9022, 1993 U.S. App. LEXIS 19953 (5th Cir. Aug. 3, 1993); *United States v. Byrkett*, 961 F.2d 1399 (8th Cir. 1992); *United States v. Corpuz*, 953 F.2d 526 (9th Cir. 1992).

[5] This disparity arises from the extremely limited circumstances in which probation may be imposed under the Sentencing Guidelines. Because probation is primarily available when the maximum term under the Guidelines is six months, the one-third provision, if applied to the originally available sentence, will generally result in a mandatory two-month prison term. Probation terms, in contrast, may run from one to five years for felonies and up to five years for misdemeanors so that the one-third provision, if applied to the period of probation imposed, would often require mandatory terms of up to 1⅔ years (or 20 months).

conclusion is not compelled by the language, structure or history of the provision. The statute is more reasonably read to require a prison term based on the originally available sentence before the imposition of probation, with any additional penalty to be determined at the discretion of the district judge.

1. As a simple matter of statutory construction and common sense, "original sentence" cannot refer to the term of probation imposed because requiring judges to impose one-third of that "sentence" would *shorten* the probation term. That was certainly not Congress's intent. To avoid that conclusion, while still arguing that there is no ambiguity, the Government advocates a tortured reading of the statute in which the verb "sentence" in the first part of the clause necessarily means imposition of a prison term while the noun "sentence" in the second part of the clause necessarily means a term of probation. So awkward a construction is less reasonable than the conclusion by the Court below that "original sentence" refers to the prison term which could have been applied under the Sentencing Guidelines had probation not been imposed.

2. Moreover, nothing in the federal probation scheme anticipates the conversion of a term of probation into a term of imprisonment, and the available terms of probation are consequently not calibrated to the seriousness of the underlying offense for which probation may be imposed (in stark contrast to actual prison terms under the Sentencing Guidelines or to terms of supervised release which are statutorily convertible into prison terms). Transformation of a probationary term into a prison term is inconsistent with the overall structure of the statutory sentencing framework.

3. Nor is the Government assisted by the statute's legislative history. Although the provision was enacted as part of a wide-ranging bill aimed at combatting drug abuse, the few excerpts of the Congressional record relat-

ing to probation revocation indicate only an intention to require at least some term of imprisonment for probationers found to possess drugs. Nothing in the legislative reports or proceedings answers the question whether the mandatory term was meant to be twenty rather than two months, or should be calculated from the full probation term rather than from the original available sentence.

4. Even assuming that the Government's interpretation of the statute is one of two reasonable ones, the language of the provision is inherently ambiguous. Under the rule of lenity, and in light of the widely-recognized distortions in sentencing caused by mandatory minimums, this Court should not infer from equivocal language a prolonged mandatory minimum term in prison for all probationers who possess narcotics, regardless of the other factors on which courts traditionally rely in imposing sentence. Instead, the statute should be interpreted to yield the shorter sentence under well established sentencing principles.

ARGUMENT

THE GOVERNMENT'S READING OF THE STATUTE IS NOT SUPPORTED BY ITS LANGUAGE, STRUCTURE OR LEGISLATIVE HISTORY

The Government tries to argue that Section 2565(a) is not ambiguous, and that "the phrase 'original sentence' is susceptible of only one interpretation." Gov't Brief at 29. The Government's analysis of the language, structure and history of the provision only serves to demonstrate that its intended meaning is unclear. The ordinary tools of statutory construction simply do not establish to any reasonable certainty what Congress intended in linking the required prison term to a probationer's "original sentence."

A. The Rule of Lenity Must Be Applied to Any Ambiguity in Section 3565(a)

This Court has only recently considered the question of how an ambiguous federal sentencing statute must be construed. In *United States v. RLC*, 112 S. Ct. 1329, 1334 (1992), a majority of the Court held that the Government's proffered interpretation of a sentencing provision in the Juvenile Delinquency Act was only "one possible resolution of statutory ambiguity." A plurality of the Court then found the Government's construction to be contradicted by the statute's legislative history, but added that "if any [ambiguity] did [survive], . . . we would choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *Id.* at 1338.[6]

Three other members of this Court would have ruled that, given the ambiguity of the statutory language, legislative history was irrelevant and "the more lenient interpretation must prevail" under the rule of lenity. *Id.* at

[6] The Court held that the provision of the Juvenile Delinquency Act limiting imprisonment to the maximum term "that would be authorized if the juvenile had been tried as an adult" referred to the maximum sentence under the United States Sentencing Guidelines, not the higher statutory maximum.

1339 (JJ. Scalia, Kennedy and Thomas, concurring). Indeed, the majority in *Crandon v. United States*, 494 U.S. 152, 160 (1990), held that "[i]t is rare that legislative history or statutory policies will support a construction of the statute broader than that clearly warranted by the text."

The rule of lenity is premised on two sound principles. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)); *see also Liparota v. United States*, 471 U.S. 419, 427 (1985). Second, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348. As the plurality in *RLC* noted, the rule is "rooted in 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Id.* at 1338.

The concerns that underlie the rule of lenity are especially implicated in this case and, unless strictly applied, would have far-reaching consequences for the administration of justice. The statutorily-required revocation of probation constitutes a critical stage of the criminal justice process both for the court and for the defendant. It signals a decision by the legislature that the original sentence properly imposed by the district judge must be reconsidered. And for the accused, it may signify the immediate termination of liberty originally granted in the discretion of the sentencing court. Resolving an ambiguity in a probation revocation statute in favor of the harsher sentence would seriously undercut the fairness of the criminal sentencing system by failing to provide notice to the defendant of the consequences of a probation violation.

Moreover, it could entail a mandatory term of imprisonment never intended by the legislature.

Clearly, the rule cannot support an "implausible" interpretation of a statute. *Taylor v. United States*, 110 S. Ct. 2143, 2157 (1990). Likewise, ambiguity does not arise "merely because it was *possible* to articulate a construction more narrow than that urged by the Government." *Moskal v. United States*, 111 S. Ct. 461, 465 (1991) (emphasis in original). But in this case, the Government's construction of the statute is itself implausible. It is "based on no more than a guess as to what Congress intended." *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (quoting *Ladner v. United States*, 358 U.S. 169, 178 (1958)). And that is exactly what the rule of lenity forbids.

B. The Government's Interpretation Is Not Compelled by The Statutory Language

Section 3565(a), by its terms, is inherently ambiguous. To begin with, whether the phrase "original sentence" means "original *available* sentence of *imprisonment*" or "original *imposed* sentence of *probation*" is not evident from the two words standing alone. The term is not defined, does not appear in the same form elsewhere in the statute, and does not on its face refer back to some other explanatory provision.

Moreover, the interpretation the Government advances runs up against the very statutory language that it cites. If "original sentence" did mean the term of probation, then one-third of that term would be a correspondingly *shorter* period of probation—a nonsensical result. In contrast, if the phrase means the originally available prison sentence under the Sentencing Guidelines, as the court below found, then one-third of the sentence would be a two-month prison term consistent with Congress' stated intention that probation be revoked.

The Government's insistence that the phrase "sentence" must mean the probationary term would also render the statute internally inconsistent. Section 3565(a) provides that the court must revoke probation and "*sentence* the defendant to not less than one-third of the original sentence." As for this initial use of the word "sentence," the Government asserts that there can be no question that it refers to a sentence of *prison*. Within the same clause, therefore, the Government would interpret the verb "sentence" to necessarily signify imposition of a prison term, and twelve words later, interpret the noun "sentence" to necessarily signify imposition of a probationary term. But as this Court has recognized just last Term, where a word is used twice in the same section of a statute, once as a verb and once as a noun, it is "reasonable to give each use a similar construction." *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993) (interpreting word "conduct" similarly as verb and as noun in Section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act).

C. Differences In the Language and Purposes of the Supervised Release Provisions Imply That Congress Intended Resentencing Schemes Different for Probation Revocation

Comparing the structure of Section 3565(a) with that of Section 3583(g), the provision for termination of supervised release that was enacted as part of the same bill, highlights the ambiguity of the statute. Section 3583(g) expressly mandates, upon termination of supervised release for possession of controlled substances, that the court "require the defendant to serve in prison not less than one-third of the term of supervised release." Not only does this statute specifically refer to the "term of supervised release" in contrast to Section 3565(a)'s use of "original sentence," but it also uses the phrase "require . . . to serve in prison" instead of the more ambiguous "sentence."

The Government's argument that the supervised release provision should be construed *in pari materia* with the probation provision does not eliminate the ambiguity. To begin with, it ignores the difference in language between the two sections. But, equally as important, it overlooks the significant differences between the two types of sentences. A period of supervised release is intended from the date of its imposition to be convertible into a prison term. Thus, upon revocation for any reason, the trial judge may "require the person to serve in prison all or part of the term of supervised release," 18 U.S.C. § 3583(g). Probation is not so convertible. Upon revocation, the judge may "impose any other sentence that was available . . . at the time of the initial sentence," but cannot simply require that the probation term be served in prison.

This critical distinction in the structures of the federal probation and supervised release schemes is underscored by the allowable terms that may be imposed under each. The supervised release statute takes into account the prospect of convertibility and carefully calibrates the available terms of release to the seriousness of the underlying offense.[7] The available terms for probation, in contrast, make no such fine distinctions among the various grades of felony, providing a five-year maximum for all non-infraction offenses with a one-year minimum for felonies. Moreover, the available supervised release terms are lower than the corresponding probation terms for all except the most serious felonies (those allowing a twenty-five year prison term or more), reflecting the difference between a term that may eventually be served in prison and one that may not.

[7] Section 3583(b) provides that the authorized terms of supervised release are "(1) for a Class A or Class B felony, not more than five years; (2) for a Class C or Class D felony, not more than three years; and (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year."

D. The Statute's Legislative History Does Not Resolve the Ambiguity

As in *RLC*, "[p]lain-meaning analysis does not . . . provide the Government with a favorable answer," 112 S. Ct. at 1334. Unable to establish that its reading of Section 3565(a) is the only viable one relying on the statutory language alone, the Government next turns to the provision's legislative history. But that exercise offers no enlightenment. Added as part of the Anti-Drug Abuse Act of 1988, the section was plainly part of an effort to impose harsher penalties on persons who possess illegal drugs. But nothing in the Congressional record—and certainly none of the excerpts the Government cites—establishes whether Congress intended the phrase "original sentence" to mean the available sentence under the Guidelines or the probationary term actually imposed. Both a mandatory two-month or a 20-month prison term would increase the punishment facing a probationer who might otherwise have hoped to continue on probation or receive a lighter prison term. The Government's conclusion that Congress must have intended the harsher penalty finds no support in the record.

On the contrary, at least one portion of the section's legislative history reflects Congress' concern with maintaining, not encroaching upon, the court's discretion in sentencing. In analyzing the various provisions of the 1988 bill, the report of the House of Representatives noted that the final version of the sections governing revocation of probation, parole and supervised release had "been modified *to preserve essential elements of judicial or parole commission discretion.*" 134 Cong. Rec. H11108, H11248 (October 21, 1988) (emphasis added). While the modifications at issue apparently did not relate specifically to Section 3565(a), this expression of legislative intent to protect the role of judicial discretion directly undercuts the Government's conclusion that Congress must have meant to impose the harsher mandatory minimum sentence.

As evidenced by the disagreement of the eight Courts of Appeals that have attempted to parse the phrase "original sentence," the statute is nothing if not ambiguous as to how the prison term is to be calculated upon revocation of probation for drug possession. A "reasonable doubt persists about [the] statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal v. United States*, 111 S. Ct. 461, 465 (1990) (citation omitted). And, given that doubt, this Court should "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *RLC*, 112 S. Ct. at 1338.

E. The Government's Reading of the Statute Creates Unreasonable Results

The Government's interpretation of Section 3565(a) which it claims is the only "reasonable" one, would also lead to wholly unjust and, in some cases, absurd results. Because possession of most controlled substances is a misdemeanor under federal law, *see* 18 U.S.C. § 844, a defendant who violated a five-year probation term by possessing drugs would face a mandatory minimum sentence higher than that available if he were charged with the actual offense. Moreover, where the probationer's underlying offense was only a misdemeanor, the Government's reading would often require imprisonment for a term longer than the statutory maximum, a prospect of doubtful constitutionality. *Cf. McMillan v. Pennsylvania*, 477 U.S. 799, 88 (1985) (raising possibility that sentencing enhancements not subject to reasonable doubt standard that result in penalties exceeding statutory maximums have due process implications).

In addition, because available probation terms exceed supervised release terms, a probationer found to possess drugs would face a higher mandatory minimum than a defendant on supervised release whose original offense was more serious and warranted imposition of a jail term.

For example, a person who was convicted of the same crime as respondent but who was found to be more culpable could have been given a harsher sentence: the guideline maximum of six months in prison, followed by three years of supervised release. If that more culpable defendant possessed drugs while on supervised release, he would be resentenced to a minimum of one year in prison. 18 U.S.C. §§ 3583(b), (g). Yet, respondent, the less culpable defendant, would, under the Government's reading of the statute, face a minimum of 20 months in prison for the same offense.

Finally, interpreting "original sentence" to mean the probationary term overlooks the *conditions* to which that term may be subject. For example, a court might impose a longer term of probation with few conditions on one defendant while a more culpable defendant might receive a shorter term with more stringent conditions, including one of home or community confinement. Nevertheless, the defendant with the more lenient sentence would face the *harsher* mandatory minimum under the Government's reading, based solely on the length rather than the type of probationary sentence.

These unreasonable disparities would also skew judges' sentencing decisions at the outset. A judge might impose a shorter probationary period than appropriate out of concern that the probation term could be converted into a prolonged prison term. A judge could also sentence a defendant eligible for probation to a short prison term to avoid the possibility that a long term of probation might become a longer prison term. Congress could not have intended these anomalous results.

CONCLUSION

For the foregoing reasons, the ABA submits that the decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

R. WILLIAM IDE III *
President
AMERICAN BAR ASSOCIATION

ANTONIA B. IANNIELLO
JEROME C. ROTH
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000
* Counsel of Record

October 8, 1993

(5)

No. 92-1662

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH STUART GRANDERSON, JR.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT RALPH STUART GRANDERSON, JR.

STEPHEN R. SADY
Chief Deputy Federal Defender
851 S.W. Sixth Ave., Suite 1375
Portland, Oregon 97204
503-326-2123

Counsel for Amicus Curiae

37 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT CASES

CIRCUIT COURT CASES

DISTRICT COURT CASES

STATUTES AND RULES

UNITED STATES SENTENCING GUIDELINES

OTHER

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation whose membership is comprised of more than 5,000 lawyers and 25,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts. Members of the NACDL regularly represent defendants sentenced in federal courts.

The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice. The Amicus Curiae Committee of the NACDL has discussed this case and decided this issue is of such importance to defense lawyers throughout the nation that the NACDL should offer its assistance to the Court.

The parties have consented to the filing of this amicus curiae brief. A consent to file has been forwarded to the Clerk of the Court.

SUMMARY OF ARGUMENT

In *United States v. Granderson*, 969 F.2d 980 (11th Cir. 1992), the Eleventh Circuit Court of Appeals, by applying the rule of lenity to an ambiguous statute, held that the term "original sentence" in 18 U.S.C. §3565(a) should be construed to mean the imprisonment range available under the federal sentencing guidelines at the time probation was imposed. This same result is available without resort to the rule of lenity. In the context of the federal sentencing statutes and guidelines, the plain meaning of "original sentence" is the guidelines calculation in the Sentencing Table prior to the non-final, conditional imposition of probation. This Court should follow the courts reaching this result without recourse to the rule of lenity.

The sentencing statutes and guidelines in effect since 1984 create a chronological, or sequential, sentencing process. The individual's offense and criminal history are calculated on a

matrix. Optional probation is available at the low end of the matrix for relatively minor offenses. The probation statutes unequivocally state that the option of a probationary "kind" of sentence is non-final and conditional. Once revoked, the probation option is annulled, leaving the computation of the guideline range on the sentencing table as the "original sentence."

The government's interpretation of 18 U.S.C. §3565 is untenable. Under the government's position, probation revocation sentences for misdemeanor offenses punishable by imprisonment for no more than a year, calculated at one-third of the "original sentence," would be for 20 months. This mathematical impossibility demonstrates the government's misconstruction of the statute. The supervised release statute also militates against the government's interpretation because it is analogous in structure to the probation statute, but uses very different language. The government's reliance on Federal Rule of Criminal Procedure 35(c) is misplaced because the focus of

guidelines appellate jurisdiction is on the calculation of the guideline range.

The plain meaning is also supported by legislative intent. Rather than demanding wholesale incarceration, Congress expressed concern that treatment be viewed as a priority and that needless incarceration be avoided. Lengthy incarceration as the mandatory response to a single lapse by non-violent probationers is contrary to rational treatment experience. Further, the needless incarceration of non-violent offenders exacerbates the mushrooming problem of over-crowded, expensive prison space.

ARGUMENT

IN THE CONTEXT OF OTHER FEDERAL SENTENCING STATUTES, THE PLAIN MEANING IN 18 U.S.C. §3565(a) OF "ORIGINAL SENTENCE" IS THE SENTENCING TABLE RANGE DETERMINED PRIOR TO THE IMPOSITION OF CONDITIONAL, NON-FINAL PROBATION.

The 1988 amendment language must be read in the context of other federal sentencing statutes in effect since the Comprehensive Crime Control Act of 1984. These statutes and subsequent guidelines create a new sentencing process from

which the terms of the amendment draw their meaning. Although the amendment to the probation revocation statute is not a model of clarity, the plain meaning of "original sentence," in the context of other federal statutes and guideline provisions, is the sentence calculation before the court chooses between probation and imprisonment options. This reading is strongly supported by Congress's expressed concern regarding drug treatment and preservation of the public from the costs of unnecessary incarceration.

A. The Plain Meaning Of The Statute Must Be Determined In The Context Of Related Sentencing Statutes And Guidelines.

The meaning of statutory language depends on its context in the language and design of the statute as a whole. *Deal v. United States*, 113 S.Ct. 1993, 1996 (1993); *King v. St. Vincent's Hospital*, 112 S.Ct. 570, 573 (1991); *McCarthy v. Bronson*, 111 S.Ct. 1737, 1740 (1991); *Crandon v. United States*, 494 U.S. 152, 158 (1990). The plain meaning of the 1988 amendment to 18 U.S.C. §3565 must be determined in the context of the entire federal sentencing statutory scheme. The

Court should consider the structure of federal sentencing statutes and guidelines to arrive at the result reached by the *Granderson* court without resort to the rule of lenity. *United States v. Roberson*, 805 F.Supp. 879, 880-82 (D. Kan. 1992), *affirmed*, 991 F.2d 627 (10th Cir. 1993); *United States v. Gordon*, 961 F.2d 426, 430-35 (3d Cir. 1992); *see United States v. Clay*, 982 F.2d 959, 962-64 (6th Cir. 1993).

B. In the Context of Federal Sentencing Statutes, "Original Sentence" Means The Sentencing Calculation Under Subchapter A Of The Sentencing Statutes.

The restructuring of sentencing law in 1984 introduced a chronological, or sequential, approach to sentence computation. Under both statute and guideline, the sentencing process involves a calculation of a range of imprisonment from the Sentencing Table. U.S.S.G. §5A1.1.[1] Only after making that calculation does the court decide the "kind" of sentence to be imposed.

[1] The Sentencing Table is a matrix with the horizontal axis reflecting the defendant's criminal history, while the vertical axis reflects the severity of the offense. The intersection of these axes determines the imprisonment range.

Probation is a "kind" of sentence that is only available in Zones A and B of the Sentencing Table. Once revoked, the sentencing process returns to the Sentencing Table calculation for the "original sentence."

The basic statute on imposition of sentence states:

> *The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless* the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C. §3553(b)(emphasis added). Subsection (a)(4) states:

> *The court, in determining the particular sentence imposed, shall consider --*
>
> ***
>
> (4) *the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines* that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced.

18 U.S.C. §3553(a)(4)(emphasis added). Thus, the statutes refer to "sentence" in the sense of a "kind" of sentence, a sentence

described by the guidelines calculations, a sentence above or below the guidelines calculation, and a particular sentence.

For certain categories of offenses and offenders, the guidelines and statutes permit imposition of probation as an alternative sanction to imprisonment. U.S.S.G. Ch. 5, intro. comment. The probation statutes themselves, in effect since 1984, are absolutely clear that the option to impose a probationary "kind" of sentence is conditional and not final. The probation statute specifically exempts a revoked sentence of probation from status as a final judgment:

> Effect of finality of judgment.-- Notwithstanding the fact that a sentence of probation can subsequently be modified or revoked pursuant to the provisions of section 3564 or 3565;
>
> ***
>
> a judgment of conviction that includes such a sentence constitutes a final judgment *for all other purposes*.

18 U.S.C. §3562(b)(emphasis added). The statute respecting probation length also explicitly recognizes the conditional nature of the probationary sentence: "[a] sentence of probation remains conditional and subject to revocation until its expiration or

termination." 18 U.S.C. §3564(e). As a conditional liberty subject to revocation and imposition of incarceration, the purposes and structure of probation under the present statutes are, as a practical matter, indistinguishable from the previous usage dating to the 17th century. *See Clay*, 982 F.2d at 962; *Gordon*, 961 F.2d at 432.

The 1988 amendment requires revocation of probation for drug possession. The plain meaning of "revocation" is that the order of a probationary term is annulled. WEBSTER'S THIRD INTERNATIONAL DICTIONARY at 1944 (1976). The nullification of the probation option returns the sentencing process to the point at which the judge chose probation as the "kind" of sentence imposed under 18 U.S.C. §3553(b). That point is generally Zones A and B of the Sentencing Table.

The Guideline on Imposition of a Term of Probation states:

> (a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:

(1) the applicable guideline range is in Zone A of the Sentencing Table; or

(2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

U.S.S.G. §5B1.1. For all means of arriving at the probation option -- the point in the sentencing process before the conditional probation that was annulled by revocation -- the "original sentence" is the Sentencing Table calculation under subchapter A.

This statutory and guideline context is reflected in the language of §3565. The first part of §3565 enumerates the trial judge's options upon finding a violation of a condition of probation:

(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or

(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

18 U.S.C. §3565(a). This statute articulates Congressional policy: punishment at revocation should focus on the offense of conviction, not the behavior that results in revocation.

This directive was recently restated in the Guidelines policy statements adopted by Congress in 1990. These policy statements reflect the debate on whether revocation consequences should concentrate on the offense of conviction or the revocation conduct. Congress approved a statement disclosing its belief that the primary purpose of probation revocation is not to punish new criminal conduct:

> After lengthy consideration, the Commission adopted the approach that is consistent with the theory of the first option; *i.e.*, at revocation the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator.

U.S.S.G. §Ch.7, Pt.A, intro. comment (n. 3(b)). The courts have uniformly construed the Revocation Table, to the extent that it contradicts this policy, to be ineffective in the context of

probation revocation. *See, e.g.*, *United States v. Williams*, 961 F.2d 1185, 1187 (5th Cir. 1992); *United States v. Boyd*, 961 F.2d 434, 437-38 (3d Cir. 1992); *United States v. Dixon*, 952 F.2d 260, 261 (9th Cir. 1991); *United States v. Von Washington*, 915 F.2d 390, 392 (8th Cir. 1990); *United States v. Smith*, 907 F.2d 133, 135-36 (11th Cir. 1990); *United States v. Alli*, 929 F.2d 995 (4th Cir. 1991).[2]

The amendment language itself is consistent both with probation as a conditional option nullified by revocation and the policy of primarily punishing the original crime, rather than the revocation conduct.

[2] The Ninth Circuit, in *United States v. Corpuz*, 953 F.2d 526, 530 (9th Cir. 1992), cited the Chapter 7 Revocation Table as support for the government's position. Ironically, *Corpuz's* reliance on the Revocation Table is based on the false assumption that simple possession of drugs is a Grade A violation. It is not. Grade A violations are defined in U.S.S.G. §7B1.1(a)(1)(ii) to include a felony "controlled substance offense." Under the Commentary to this section, "controlled substance offense" is defined in the Career Offender provisions -- U.S.S.G. §4B1.2. U.S.S.G. §7B1.1, comment. (n.2)(1990). That section includes only trafficking and manufacturing types of offenses, not simple possession of drugs. U.S.S.G. §4B1.2(2). Under federal law, simple possession of a drug is generally a misdemeanor (21 U.S.C. §844(a)) and therefore a Grade C violation. U.S.S.G. §7B1.1(a)(3)(1990). Under the Revocation Table, a sentence of less than one year is available for every Criminal History Category and required for Criminal History Categories I, II, and III. The Chapter 7 policy statements support, rather than undercut, the *Granderson* court's result.

> Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance, thereby violating the condition imposed by section 3563(a)(3), the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.

Thus, subsection (1) is irrelevant if possession of a controlled substance is involved, and subsection (2) is qualified by the limitation to one-third the imprisonment calculation before the conditional "kind" of sentence was determined to be probation. The amendment and subsection (2) must be read together because they are not irreconcilable and implied repeals are not favored. *Clay*, 982 F.2d at 963; *Gordon*, 961 F.2d at 431.

The "original sentence" cannot be the term of probation because, by the terms of the amendment itself, the probation option must be annulled.[3] This result is also compelled by the statutory and Guidelines policy that, upon revocation of

[3] This reading also avoids the absurd interpretation that one-third of the original sentence to probation requires a reduction in the probationary term (*e.g.*, three years probation must be reduced to at least one year probation). *See Gordon*, 961 F.2d at 433.

probation, the focus of punishment is primarily the original offense, not the behavior resulting in revocation.

The only logical, plain meaning of the statute, in the context of the federal sentencing scheme in effect since 1984, is that "original sentence" refers to the sentencing calculation under subchapter A prior to the option of conditional, non-final probation. Within the original subchapter A sentence that the defendant faced, the 1988 amendment limited the court to a sentence of one-third or more within that range.

C. The Government's Interpretation Of §3565 Cannot Be Reconciled With Other Federal Sentencing Statutes.

Reference to the general statutory scheme precludes the interpretation offered by the government. Most obviously, the term "original sentence" makes no reference to the conditional, non-final term of probation. If such an unusual result were intended, appropriate language was available. The absence of such a reference signals that "original sentence" refers to the sentencing stage before the probationary term was imposed. This reading is supported by the statutory maximum sentences

for federal misdemeanors, the supervised release statute, and Rule 35(c).

1. Misdemeanors.

The government's interpretation cannot be reconciled with the punishments available for misdemeanors. Misdemeanors are punishable by no more than one year incarceration. 18 U.S.C. §§ 3581(b)(6); 3559(a)(6). Under the probation statute, terms of probation of five years are authorized for all misdemeanors and felonies. 18 U.S.C. §3561(b). Therefore, under the government's interpretation of the statute, a mandatory sentence of 20 months is one-third of an "original sentence" that cannot exceed one year for a misdemeanor. The government's position is irrational and mathematically indefensible in the context of the applicable statutory maximum punishments.

This point is especially telling because misdemeanants are likely recipients of probationary sentences. By their nature, misdemeanors are relatively minor offenses usually involving no violence. The guideline ranges for such offenses are uniformly low.

2. Supervised Release -- 18 U.S.C. §3583(g).

Congress enacted a parallel amendment addressing revocation of supervised release for drug possession at the same time as the amendment to the probation revocation statute was adopted. Unlike the probation revocation amendment, the supervised release amendment specifies that the mandatory minimum sentence should be one-third of the term of supervision: "not less than one-third of the term of supervised release." 18 U.S.C. §3583(g). The marked semantic differences in these parallel statutes connote an intended penological difference between the term of supervision and the "original sentence." *Clay*, 982 F.2d at 963-64; *Gordon*, 961 F.2d at 431.

The probation and supervised release statutes are structurally similar. The supervised release statute sets out a range of imprisonment upon revocation that is often less than the period of supervision the same way the Sentencing Table computation limits probation revocation sentences. In 18 U.S.C. §3583(e)(3), punishment is limited upon revocation to the term of supervised release and the applicable guideline range for

supervised release "except that a person whose term is revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years if the offense was a Class C or D felony . . ."[4] Supervised release for Class B felonies can be up to 5 years; for Class C and D felonies, the maximum is 3 years supervised release. Probation also involves a term of supervision with a lesser guideline range calculated before the court exercises the conditional, non-final option of probation.

Despite these structural similarities, Congress chose to use very different language when describing the consequence of drug possession for persons under each form of conditional supervision. Supervised release involves a period of supervision with a lesser term of potential punishment; Congress specified the period of supervised release as the relevant period for

---

[4] The statute qualifies the imposition of a prison term as "pursuant . . . to the provisions of the applicable policy statements issued by the Sentencing Commission . . ." 18 U.S.C. § 3583(e)(3). This reference is to the Chapter 7 policy statements that, since 1990, include a Revocation Table for guideline ranges upon revocation pursuant to the Congressional instruction in 28 U.S.C. §994(a)(3).

measuring the one-third mandatory minimum sentence. Congress pointedly does not specify the term of supervision in the probation statute as the measure for determining the one-third punishment upon revocation. In this context, the reference in the probation statute to "original sentence" is plainly to the guideline range calculated before the "kind" of sentence was determined to be probation, rather than imprisonment.

3. Fed.R.Crim.Pro. 35.

The government refers to Federal Rule of Criminal Procedure 35(c)(2) in support of its position.[5] Rule 35 refers to correction of a sentence determined under the sentencing guidelines appellate statute, 18 U.S.C. §3742, to have been "imposed in violation of law, to have been imposed as a result of an incorrect application of the guidelines or to be unreasonable." Fed.R.Crim.Pro. 35(a). Generally, appellate guideline jurisdiction is limited to incorrect calculations of the sentencing guideline range; a sentence within the guideline range

[5] The government's other citations to statutes using the term "original sentence" are irrelevant because the statutes pre-dated the Comprehensive Crime Control Act of 1984.

and not imposed in violation of law or as a result of an incorrect application of the guidelines is not appealable. *See, e.g., United States v. Davis*, 900 F.2d 1524, 1529 (10th Cir. 1990); *United States v. Guerrero*, 894 F.2d 261, 270 (7th Cir. 1990); *United States v. Soliman*, 889 F.2d 441 (2d Cir. 1989); *see generally* U.S.S.G. §5G1.1(c) (aside from statutory maximum and minimum sentences, "the sentence may be imposed at any point within the applicable guideline range"). Therefore, Rule 35's use of "original sentence" does not support the government's interpretation because appellate courts do not generally review whether a particular number of months incarceration was "incorrect"; the focus is whether the guidelines calculations were in violation of law or the result of an incorrect application of the guidelines.

D. The Congressional Intent Contradicts The Government's Construction Of The Statute Because The Legislative Emphasis Is On Treatment And Limiting The Costs Of Unnecessary Incarceration.

The government's Queen of Hearts caricature of Congressional intent ignores Congress' emphasis on treatment

and limiting incarceration costs. The legislative record and the social science of addiction treatment support the reading of "original sentence" as the subchapter A guideline range. The requirement of one-third of the guideline range is a stiff sanction consonant with the concerns expressed in the legislative history.

Congress leavened the concern for firm consequences for drug possession with a realistic emphasis on treatment and avoiding unnecessary incarceration. The legislators emphasized treatment and rehabilitation programs "which we must adequately fund if we are ever to truly rid our society of the drug scourge which afflicts us." 134 Cong. Rec. 32632 (1988)(remarks of Sen. Byrd); *see also id.* at 32638 (Sen. Pell)("We need treatment on demand."); *id.* at 32637 (Sen. Rockefeller) ("we must pay much more attention to . . . rehabilitating those who are addicted."); *id.* at 32639 (Sen. McConnell)("This legislation expands drug treatment and rehabilitation . . . . It is a war we must fight on all fronts."). In providing for administrative sanctions, Congress "recognize[d] that our courts and prisons are

seriously overcrowded and cannot bear the burden of processing these new criminal cases." *Id.* at 32634 (Sen. Dole).

1) Treatment Considerations.

Sixteen percent of the country's population are estimated to use illegal drugs in a single year. 134 Cong. Rec. 32636 (1988)(remarks of Sen. Rockefeller)("as many as 37 million Americans used illegal drugs in 1987"). Studies repeatedly confirm our anecdotal knowledge that many persons charged with crimes suffer from addiction. *See* BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE PRISON INMATES, 1991 (March 1993)(about 86% of inmates had used drugs and about 63% used drugs regularly); Wish & O'Neil, DRUG USE FORECASTING RESEARCH UPDATE: JANUARY TO MARCH 1989 (National Institute of Justice 1989). Congress has clearly recognized treatment as a priority for addressing this serious problem, especially for persons eligible for probationary sentences. 18 U.S.C. §3553(a)(2)(D)(court must consider defendant's need for medical care or "other correctional treatment in the most effective manner"); 18 U.S.C. §3563(b)(10) (discretionary

condition that probationer "undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose").

Involvement in substance abuse does not fit stereotypes. Each individual addiction is a unique combination of physical and psychological cravings, recreational pleasure seeking, genetic predisposition, self-treatment for underlying disorders, self-destructiveness, family patterning, and biochemical needs. However, two general considerations strongly favor Congressional intent for the lower mandatory minimum: the recognition that relapse is part of treatment and the futility of incarceration to treat addiction.

The literature of drug treatment is rife with recognition that, as with nicotine and alcohol addictions, relapse is part of recovery. *See, e.g.*, Arnold M. Washton, *Preventing Relapse to Cocaine*, 49:2 (Suppl) J. CLIN. PSYCHIATRY, February 1988), at

34;[6] Brownell, Marlatt, Lichtenstein & Wilson, *Understanding and Preventing Relapse*, AMER. PSYCHOLOGIST (July 1986), at 765. For reasons no one fully understands, addiction is not a switch that is turned on and off; those who suffer drug dependence must struggle daily and perhaps for a lifetime to overcome the urge to use. However, a lapse does not mean that treatment has failed or that more use of drugs necessarily follows. G. Alan Marlatt & Judith R. Gordon, RELAPSE PREVENTION (Guilford 1985) at 32-34.

When a probationer, who is by definition a non-dangerous offender,[7] uses drugs, a firm response is appropriate. However, a massive, condemnatory sentence to a lengthy term of

---

[6] Dr. Washton emphasized that relapse is not indicative of treatment failure, as follows:

> Relapse is a signal that recovery is incomplete. It indicates that the patient's attitude and behavior require additional change. Any progress achieved up to the point of relapse is not automatically nullified by the use of drugs. Although relapse must never be recommended and should be taken seriously whenever it occurs, the clinician and patient must carefully examine any relapse episode for its learning value and not treat it as a failure.

Id. at 35.

[7] Probation is not available to persons convicted of Class A or Class B felonies and is excluded if the guideline range exceeds Zone B on the sentencing table. 18 U.S.C. §3561(a).

imprisonment contradicts the explicit policies adopted by Congress favoring treatment. In this context, the requirement of revocation and one-third of the guideline range is a severe consequence,[8] especially because it is typically followed by an additional period of supervised release.[9]

Incarceration alone does not treat addiction. Even if drugs were not available in prison, the period of imprisonment often results in release at the same level of need for controlled substances. However, treatment of drug addiction is a real possibility. *See, e.g.*, Institute of Medicine, TREATING DRUG PROBLEMS, Volume 1 (National Academy Press 1990) at 134-35; Carl G. Leukefeld & Frank M. Tims, *An Introduction to Compulsory Treatment for Drug Abuse*, NIDA MONOGRAPH 86

[8] We disagree with the government's claim that incarceration is required. Under the Guidelines, all probation sentences were originally in Zone A or Zone B which allows for incarceration or "a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment . . ." U.S.S.G. §5C1.1(c)(1) and (2).

[9] Whenever a sentence to a term of imprisonment is imposed, the court has the option of imposing supervised release for any offense greater than a petty offense. 18 U.S.C. §3583(a). If a person has violated probation, supervised release is likely to follow the incarceration. U.S.S.G. §5D1.2.

(1988) at 3. Terminated treatment and massive punishment for a single use deprecates the importance and difficulties of treatment of the probationer.

At one-third of the imprisonment under the Sentencing Table, probationers are subjected to a severe sanction for drug possession. For a Zone A probationer, possession of drugs results in mandatory revocation of probation, at least 60 days confinement, and a sentence to supervised release. Congress recognized this was a harsh sanction because it retained the mandatory minimum sentence of a $1,000.00 fine for first offenders guilty of simple possession of a controlled substance and 15 days incarceration and a $2,500.00 fine for repeat offenders. 21 U.S.C. §844.[10] Increasing the mandatory minimum by 400% for revoked probationers is certainly consistent with the intent to view possession of drugs seriously.

Increasing the mandatory minimum to 20 months, in excess of the statutory maximum for misdemeanors, increases the

[10] Congress also retained the expungement procedures for drug possessors convicted under §844. 18 U.S.C. §3607.

mandatory minimum for repeat drug offenders (15 days) by 4,000%. Moreover, the probationer may not even be a repeat drug offender. There is not a syllable in the legislative history, such as it is, that indicates any such Congressional intention. Indeed, such a vindictive and harsh view runs counter to the repeated expression of the need for treatment.

The severity of the sanction of one-third of the Sentencing Table calculation is also reflected in the comparative treatment of possession of drugs under the Guidelines. The Sentencing Table allots some of the lowest levels to drug possession offenses. U.S.S.G. §2D2.1(a). For example, a defendant with a long and sordid criminal history would face six to twelve months for possession of marijuana; one to seven months if the defendant accepted responsibility for the offense under U.S.S.G. §3E1.1. Under the government's view, by contrast, a first-time embezzler who received five years probation would have to receive a prison sentence of twenty months for possession of the same marijuana. In this context, the mandatory minimum provisions set an incrementally greater punishment as a floor to

the sentence; the government's interpretation simply proposes an irrationally disproportionate response inapposite to Congress' desire for treatment and prioritization of limited prison space.

2) Prison Space Considerations.

The Comprehensive Crime Control Act of 1984 specifically considered the effect of sentencing practices on the prisons. Congress instructed the Commission, in constructing the Guidelines, to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" and "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . ." 28 U.S.C. §994(g). These concerns support the limited reading of the probation revocation statute.

A prime consideration in the sentencing system created by the CCCA of 1984 is limitation of imprisonment to an amount "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 18 U.S.C. §3553(a). In addition to the evil of needless deprivation of liberty, this concern focuses on the costs of imprisonment.

In fiscal year 1992, the Sentencing Commission recorded 37,744 persons sentenced in federal courts. UNITED STATES SENTENCING COMMISSION, 1992 ANNUAL REPORT, Table 20. Of the annual dispositions in 1992, 8,976 defendants, or 23.8%, received probationary terms. *Id.* The overall number of probationers is presently about 53,991, of whom about 25% have drug abuse problems. PROBATION AND PRETRIAL SERVICES DIVISION OF THE ADMINISTRATIVE OFFICE, SUBSTANCE ABUSE TREATMENT PROGRAM SUMMARY REPORT (September 1993) at 3; *see* DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,1992 ANNUAL REPORT, Table 21 (the number of drug dependent defendants under Probation Office supervision increased annually from 12,247 in fiscal year 1988; to 14,589 in 1989; 17,264 in 1990; 18,377 in 1991; and 19,152 in 1992.) In 1992, the courts terminated 2,909 probationers, about 22% of all terminations of probation, for violating conditions of probation. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1992 ANNUAL REPORT, Table E-7 at 311.

Given the number of drug dependent probationers and the normalcy of relapse, strict enforcement of the mandatory minimum statute at the rates advocated by the government creates an unsupportable burden on the prison system unintended by Congress. The costs of imprisonment are conservatively estimated by the Sentencing Commission to be $56.84 daily, or $20,803.00 per inmate per year. BOP OFFICE OF PUBLIC AFFAIRS, FACTS ON FEDERAL BUREAU OF PRISONS (June 1993).[11] The federal prison system, by the Bureau of Prisons' own estimates, is currently operating at 141% of its capacity. *Id.*

Nothing in the legislative history remotely suggests that Congress decided to require arbitrary and harsh punishment of drug users beyond one-third of the subchapter A calculation. The government's construction of §3565 runs contrary to rational treatment approaches to drug addiction and rational fiscal policies for the allocation of scarce prison resources.

---

[11] This number is low because it does not consider amortization of prisons already in existence or construction costs of new prisons.

CONCLUSION

This Court should affirm the *Granderson* result because the plain meaning of the words "original sentence," in the context of the federal sentencing scheme, is to the subchapter A calculation prior to the imposition of the conditional, non-final probation option. The plain meaning is also the only reading consistent with Congressional policies favoring treatment of drug addiction and limiting needless incarceration of citizens.

Respectfully submitted,

Stephen R. Sady
Chief Deputy Federal Defender
851 S.W. Sixth Avenue, Suite 851
Portland, Oregon 97204
503-326-2123

Counsel for Amicus Curiae, NACDL